112

Supreme Court, U.S.
FILED

No. 08-683 NOV 21 2008

OFFICE OF THE CLERK

In The Supreme Court of the United States

F. DOUGLAS CANNON, MARGARET LOUISE CANNON, and ALLAN ROBERT CANNON,

Petitioners,

v.

ROBERT M. GATES, Secretary, United States Department of Defense; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE ARMY; UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD W. OPSAHL*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

HAL J. POS
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 532-1234

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the federal government may assert that it has selected a removal or remedial action under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9604, by relying upon decades of on-and-off preliminary investigations without finalizing a response plan?

2. Whether Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9313(h), strips federal courts of jurisdiction in suits that are directed merely toward compelling the party responsible for contaminating a site with hazardous waste, in this case the federal government, to timely clean up the hazardous waste it generated, and do not attempt to delay the cleanup of the site?

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

The caption lists all the parties. Petitioners F. Douglas Cannon, Margaret Louise Cannon, and Allan Robert Cannon are individuals and not corporations. Therefore, no corporate disclosure statement is required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 DISCLOSURE	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	11
I. THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE SPLIT BETWEEN THE TENTH CIRCUIT'S HOLDING IN THE INSTANT CASE AND THE SEVENTH CIRCUIT'S HOLDING IN *FREY v. ENVIRONMENTAL PROTECTION AGENCY*	11
A. This Court Should Clarify the Important Issue of Unresolved Federal Law as to When a Suit Challenges a Selected Removal or Remedial Action	14
1. The Cannons were not "challenging" a CERCLA response action	14
2. The superficial actions of the Corps of Engineers do not constitute a "removal" or "remedial" action	16
3. The Corps of Engineers did not "select" a removal or remedial action	19

TABLE OF CONTENTS – Continued

Page

B. The Tenth Circuit's Decision Created a Split with the Seventh Circuit's Holding in *Frey v. Environmental Protection Agency* 21

II. THIS COURT SHOULD GRANT THE PETITION TO ESTABLISH THAT THE PREENFORCEMENT REVIEW PROVISION OF CERCLA WAS NOT DESIGNED TO SERVE AS A CATEGORICAL BAR TO ACTIONS SEEKING TO COMPEL A TIMELY CLEANUP 25

CONCLUSION 29

APPENDIX

Cannon v. Gates, No. 07-4107, Opinion (10th Cir. Aug. 26, 2008) ..... App. 1

Cannon v. Gates, No. 05-922, Order (D.Utah Apr. 5, 2007) ..... App. 19

42 U.S.C. § 9601(23), (24) ..... App. 29

42 U.S.C. § 9604(a)(1) ..... App. 32

42 U.S.C. § 9613(h) ..... App. 34

United States Army Corps of Eng'rs, *Formerly Used Defense Sites (FUDS) Program Policy*, Reg. No. 200-3-1 (May 10, 2004) (excerpt) .... App. 36

TABLE OF AUTHORITIES

Page

CASES

Blount v. Rizzi, 400 U.S. 410 (1971) 20

Broward Gardens Tenants Ass'n v. United States Envtl. Prot. Agency, 157 F.Supp.2d 1329 (S.D.Fla. 2001), *aff'd*, 311 F.3d 1066 (11th Cir. 2002).....14, 25

Cannon v. Gates, No. 05-922 (D.Utah Apr. 5, 2007), *aff'd*, 538 F.3d 1328 (10th Cir. 2008) (*Cannon II*) .....*passim*

Cannon v. United States, 338 F.3d 1183 (10th Cir. 2003) (*Cannon I*) 6, 7, 8

Costner v. URS Consultants, Inc., 153 F.3d 667 (8th Cir. 1998) 14

Exxon Corp. v. Hunt, 475 U.S. 355 (1986).....16, 22

Frey v. Envtl. Prot. Agency, 270 F.3d 1129 (7th Cir. 2001) (*Frey I*).....22

Frey v. Envtl. Prot. Agency, 403 F.3d 828 (7th Cir. 2005) (*Frey II*) 11, 13, 21, 22, 23

Gen. Elec. Co. v. Envtl. Prot. Agency, 360 F.3d 188 (D.C. Cir. 2004) (*per curiam*) 16

McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325 (9th Cir. 1995).....14, 15

Moskal v. United States, 498 U.S. 103 (1990) 20

New Mexico v. Gen. Elec. Co., 467 F.3d 1223 (10th Cir. 2006) 15

Razore v. Tulalip Tribes of Wash., 66 F.3d 236 (9th Cir. 1995) 15

TABLE OF AUTHORITIES – Continued

Page

Russello v. United States, 464 U.S. 16 (1983).....20

United States v. City and County of Denver, 100 F.3d 1509 (10th Cir. 1996) 11, 12

United States v. Labonte, 520 U.S. 751 (1997).....20

STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* 10

§ 706(1) 10

Defense Environmental Restoration Program, 10 U.S.C. §§ 2700-2710 7

§ 2701(a) 7

§ 2701(a)(2).....7

§ 2701(c).....7, 19

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 10 U.S.C., 26 U.S.C., and 42 U.S.C.).....12

Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k.....9

§ 6972(a) 9

TABLE OF AUTHORITIES – Continued

Page

§ 6972(a)(1)(A) 9

§ 6972(a)(1)(B) 9

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675

§ 9601(23) 2, 16, 18

§ 9601(24) 3, 16, 18

§ 9604 ..... 10, 13, 14

§ 9604(a)(1) 4

§ 9613(h) 1, 5, 10, 12, 13

REGULATIONS

40 C.F.R. Part 300

§ 300.415(b)(4)(i) 8

§ 300.430(e)(9)(*iii*) 17

§ 300.430(i) 17

§ 300.700(c)(4) 17

RULE

Supreme Court Rule 13.3 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA's Two Response System*, 18 Colum. J. Envtl. L. 103 (1993).....17

Black's Law Dictionary (6th ed. 1995).....20

Brian Patrick Murphy, Note, *CERCLA's Timing of Review Provision: A Statutory Solution to the Problem of Irreparable Harm to Health and the Environment*, 11 Fordham Envtl. L.J. 587 (2000).....12

Jonathan N. Reiter, *CERCLA Section 113(h) & RCRA Citizen Suits: To Bar or Not To Bar?* 17 UCLA J. Envtl. L. & Pol'y 207 (1998-1999).....12

S. Rep. No. 99-11 (1985).....12, 25

United States Army Corps of Eng'rs, *Formerly Used Defense Sites (FUDS) Program Policy*, Reg. No. 200-3-1 (May 10, 2004).....19, 20

PETITION FOR WRIT OF CERTIORARI

F. Douglas Cannon, Margaret Louise Cannon, and Allan Robert Cannon hereby petition this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The United States District Court for the District of Utah dismissed the Cannons' claims for lack of subject matter jurisdiction pursuant to the jurisdiction-stripping provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9613(h). *Cannon v. Gates*, No. 05-922, slip op. (D.Utah Apr. 5, 2007) (App. 19). The Cannons appealed and the Tenth Circuit affirmed the District Court's decision. *Cannon v. Gates*, 538 F.3d 1328 (10th Cir. 2008) (App. 1).

JURISDICTION

The District Court had jurisdiction over the Cannons' claims pursuant to 28 U.S.C. § 1331. The Tenth Circuit had jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291. Pursuant to Supreme Court Rule 13.3, this Petition is timely filed within 90 days of the Tenth Circuit's judgment. Pursuant to 28 U.S.C. § 1254(1), this Court

has jurisdiction to review the judgment of the Tenth Circuit.

STATUTORY PROVISIONS INVOLVED

Section 101 of CERCLA defines the terms "remove" or "removal" as:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

42 U.S.C. § 9601(23) (App. 29-30).

Section 101 of CERCLA defines the terms "remedy" or "remedial action" as:

> The terms "remedy" or "remedial action" means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. . . .

Id. § 9601(24) (App. 30-31).

Section 104 of CERCLA provides the authority for the federal government to undertake a response action:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. . . .

Id. § 9604(a)(1) (App. 32-33).

Section 113(h) of CERCLA bars preenforcement review of response actions selected under Section 104 of CERCLA:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating

> to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title. . . .

Id. § 9613(h) (App. 34-35).

STATEMENT OF THE CASE

In 1945, the Cannons' grandfather, Jesse Fox Cannon, entered into a six-month lease with the United States War Department.[1] The lease provided that, in exchange for one dollar and other valuable consideration, Jesse Fox Cannon would permit the federal government to enter onto his land "in order to survey and carry out such other exploratory work as may be necessary in connection with the property; to erect buildings and any other type of improvement; and to perform construction work of any nature." *Cannon v. Gates*, 538 F.3d 1328, 1330 (10th Cir. 2008) (*Cannon II*) (App. 3). The federal government agreed that, at the expiration of the lease, it would "leave the property of the owner in as good condition as it is on the date of the government's entry." *Id.*

[1] Jesse Fox Cannon owned over 1,416 acres of land in Tooele County, Utah, adjacent to the United States Army's Dugway Proving Grounds. This property has been conveyed over time through Mr. Cannon's family and is now owned by three of Mr. Cannon's grandchildren, F. Douglas, Margaret Louise, and Robert Allan – Petitioners herein. The Cannons' property is also referred to as the "Yellow Jacket Mines area."

Unbeknownst to Mr. Cannon, the federal government utilized the Cannons' land to conduct Project Sphinx, which was designed to test "means of battling Japanese forces entrenched in caves in the Pacific Islands." *Cannon v. United States*, 338 F.3d 1183, 1184 (10th Cir. 2003) (*Cannon I*). As part of that testing, the federal government used incendiary weapons, chemical weapons, and conventional bombs; in all, the federal government detonated at least 3,000 rounds of ammunition and 23 tons of chemical weapons in the tests conducted on the Cannons' property. *Id.* at 1185, n.1.

After completing its testing, "[t]he Army failed to keep its promise to clean up Cannon's property." *Id.* at 1185. When Jesse Fox Cannon reentered the land in September 1945, "the entire area [was] liberally covered with shell, rocket, and bomb fragments." *Id.* at 1185, n.2 (internal quotation omitted). Between 1945 and 1950, Jesse Fox Cannon filed three administrative claims with the federal government. As to the first claim, the federal government paid Mr. Cannon $755 for disrupting his mining activities; as to the second claim, Mr. Cannon received $2,064 for the destruction of mine shaft timbering; and the federal government denied Mr. Cannon's third claim, which asserted that Mr. Cannon had been unable to lease his mines because they still contained poisonous gas from the federal government's chemical weapons testing. *Cannon II*, 538 F.3d at 1330 (App. 4).

Over the years, Jesse Fox Cannon's son, Dr. J. Floyd Cannon, unsuccessfully requested that the

federal government clean up the property. *Cannon I*, 338 F.3d at 1185. Beginning in the 1970s, the United States Army Corps of Engineers initiated efforts to study contamination at the Army's Dugway Proving Grounds; the Cannons' property was included in some of these efforts.[2] *Id.* at 1185-1186. In a 1988 update to a 1979 report, the United States Army suggested the Cannons' property be purchased by the United States and withdrawn from the public domain due to the potential for unexploded ordinance remaining on the property and the contamination from the federal government's weapons testing. *Id.* at 1186. The 1988 update report reiterated that the Cannons' property was "potentially contaminated with hazardous materials" and purportedly was subject to an ongoing "environmental assessment." *Id.* Finally, in 1994, the Corps of Engineers contracted for the completion of an Engineering Evaluation and Cost Analysis Report ("EE/CA"). *Id.* In 1996, the Corps of Engineers completed a draft EE/CA that confirmed the Cannons' property was highly contaminated with hazardous waste and outlined several options for cleaning up the property. *Id.* at 1186-1188. The Corps of Engineers

---

[2] Although the Environmental Protection Agency ("EPA") has CERCLA authority over most hazardous waste sites, CERCLA authority over Department of Defense sites instead is delegated to the Secretary of Defense. 10 U.S.C. § 2701(a). Pursuant to that authority, the Secretary cleans up "formerly used defense sites" pursuant to the Defense Environmental Restoration Program. *Id.* §§ 2700-2710. The Secretary's cleanup of these hazardous waste sites is to be in accordance with CERCLA. *Id.* § 2701(a)(2), (c).

never finalized the EE/CA, and it remains in draft form only.[3] *Id.* at 1188. In fact, despite decades of purported study, the Cannons' property has yet to be cleaned up; the surface and subsurface remain littered with hazardous waste from the federal government's World War II era weapons tests. *Cannon II*, 538 F.3d at 1331 (App. 4-5).

In 1998, Margaret Louise and Allan Robert Cannon, who then together owned 75 percent of the property at issue, filed suit against the federal government under the Federal Tort Claims Act. *Cannon I*, 338 F.3d 1183. Following a bench trial, the United States District Court for the District of Utah awarded the Cannons $160,937 in damages for the diminished value of the Cannons' land caused by the federal government. *Id.* at 1189. The federal government appealed, and the Tenth Circuit reversed the District Court's judgment, holding that the statute of limitations barred the Cannons' claims. *Id.* at 1184, 1189-1194.

---

[3] Corps of Engineers' regulations require completion of an EE/CA before the Corps may select a removal alternative. 40 C.F.R. § 300.415(b)(4)(i). In fact, without completion of an EE/CA, the Corps of Engineers would not have the information necessary, nor the alternatives developed, from which to make any decision regarding a hazardous waste cleanup. The Tenth Circuit, however, erroneously stated that completion of an EE/CA is "merely a collateral step" in the United States's administrative process. *Cannon II*, 538 F.3d at 1334, n.5 (App. 14).

In November 2005, frustrated by the nearly ten years of inaction by the federal government since the issuance of the draft EE/CA, Margaret Louise, Allan Robert, and F. Douglas Cannon filed the instant suit. The Cannons alleged violations of the Resource Conservation and Recovery Act of 1976 ("RCRA")[4]

---

[4] 42 U.S.C. §§ 6901-6992k. The Cannons pursued two claims under RCRA. Their first claim was filed under 42 U.S.C. § 6972(a)(1)(A), which permits "any person" to "commence a civil action on his own behalf . . . against any person (including (a) the United States and (b) any other governmental instrumentality or agency . . .) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter. . . . " 42 U.S.C. § 6972(a), (a)(1)(A). In support of this claim, the Cannons alleged that the federal government was in violation of federal and Utah regulations applicable to generators of hazardous wastes.

The Cannons' second claim was filed under 42 U.S.C. § 6972(a)(1)(B), which permits "any person" to "commence a civil action on his own behalf . . . against any person, including the United States and any other governmental instrumentality or agency, . . . and including any past or present generator, past or present transporter, or past and present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . ." 42 U.S.C. § 6972(a)(1)(B). In support of this claim, the Cannons alleged that the federal government contributed to conditions on their property that endanger the Cannons, other individuals mining on the Cannons' property, and members of the general public who come onto the Cannons' property.

and the Administrative Procedure Act ("APA").[5] *Cannon II*, 538 F.3d at 1331 (App. 6-7). In its defense, the federal government argued that the decades of on-and-off, cursory investigations performed by the Corps of Engineers sufficed to trigger the bar against preenforcement review contained in CERCLA, which ostensibly strips federal courts of jurisdiction to hear "challenges to removal or remedial action[s] selected under section 9604 of [42 U.S.C.]." 42 U.S.C. § 9613(h); *Cannon II*, 538 F.3d at 1332 (App. 9). The District Court agreed with the federal government's assertion and held that federal courts lacked jurisdiction to hear the Cannons' claims. *Cannon v. Gates*, slip op. at 6 (D.Utah) (App. 26). On appeal, the Tenth Circuit affirmed the District Court's order. *Cannon II*, 538 F.3d at 1336 (App. 18). Thus, the issue the Cannons present in this Petition is whether preenforcement review is barred in cases where the federal government simply points to purportedly ongoing investigations that have no end in sight, or whether the federal government must point to an objective referent that commits it and other responsible parties to an action or plan before it may invoke CERCLA's timing-of-review provision.

---

[5] 5 U.S.C. §§ 551 *et seq*. The APA permits a court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition for Writ of Certiorari to clarify that CERCLA does not bar preenforcement review in cases in which an injured party seeks to compel the federal government to clean up a hazardous waste site. That is, the federal government may not be permitted to use CERCLA's timing-of-review provision as a shield against the timely cleanup of hazardous wastes when the federal government itself was the polluter and has continued to refuse to clean up a contaminated site – in this case, failing to meet its obligations for more than 63 years. Amorphous investigations, with no objective time frame or end point, are insufficient to invoke the bar on preenforcement review. Moreover, to permit the use of CERCLA's timing-of-review provision in cases such as this defeats Congress's intent that CERCLA provides a means for the timely cleanup of hazardous waste sites in the United States. These are issues of important national significance and unsettled federal law that require this Court's clarification.

I. THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE SPLIT BETWEEN THE TENTH CIRCUIT'S HOLDING IN THE INSTANT CASE AND THE SEVENTH CIRCUIT'S HOLDING IN *FREY v. ENVIRONMENTAL PROTECTION AGENCY*.

Although CERCLA was enacted to "provide a mechanism for the prompt and efficient cleanup of hazardous waste sites," *United States v. City and*

County of Denver, 100 F.3d 1509, 1511 (10th Cir. 1996), by the mid-1980s expedited CERCLA cleanups were rare events. *See* Brian Patrick Murphy, Note, *CERCLA's Timing of Review Provision: A Statutory Solution to the Problem of Irreparable Harm to Health and the Environment*, 11 Fordham Envtl. L.J. 587, 591-604 (2000) (discussing the need for CERCLA's timing-of-review provision). Indeed, sites targeted for cleanup were mired frequently in lawsuits commenced by potentially responsible parties ("PRPs") challenging their expected financial contribution or liability. *Id.* at 597-598. As such, litigation and its incumbent costs commonly diverted money from CERCLA's primary objective. *See* S. Rep. No. 99-11, at 58 (1985). Moreover, the time consumed in litigation jeopardized the ultimate success of some cleanups because halting the spread of improperly handled hazardous materials is often a race against time. Jonathan N. Reiter, *CERCLA Section 113(h) & RCRA Citizen Suits: To Bar or Not To Bar?* 17 UCLA J. Envtl. L. & Pol'y 207, 208 (1998-1999).

In response to this problem, Congress amended CERCLA in 1986 to include provisions that reduce the frequency of such litigation. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 10 U.S.C., 26 U.S.C., and 42 U.S.C.). Among these amendments is the timing-of-review provision codified at CERCLA Section 113(h), 42 U.S.C. § 9613(h). The timing-of-review provision provides:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title. . . .

42 U.S.C. § 9613(h) (App. 34).

Thus, for the timing-of-review provision to apply, a plaintiff must: (1) challenge, (2) a removal or remedial action, (3) that has been selected under Section 104 of CERCLA, 42 U.S.C. § 9604. On the record before it, the Tenth Circuit, as the District Court before it, erred in holding that the superficial actions of the Corps of Engineers qualified as a removal action selected under CERCLA and, thus, should not have dismissed the Cannons' case for lack of jurisdiction. In so doing, the Tenth Circuit expressly acknowledged that it created a conflict between its jurisprudence and that of the Seventh Circuit. *Cannon II*, 538 F.3d at 1335, n.7 (App. 16) ("We recognize that this conclusion splits with the Seventh Circuit's holding in *Frey v. EPA*, 403 F.3d 828 (7th Cir. 2005)."). Accordingly, this Court should grant this Petition in order to rectify this circuit split.

A. This Court Should Clarify the Important Issue of Unresolved Federal Law as to When a Suit Challenges a Selected Removal or Remedial Action.

1. The Cannons were not "challenging" a CERCLA response action.

The Tenth Circuit, as the District Court before it, failed to give effect to the plain language of Section 113(h) of CERCLA, which only postpones judicial review of "*challenges*" to removal or remedial actions that have been selected by the federal government using the procedures provided by Section 104 of CERCLA, 42 U.S.C. § 9604. Although CERCLA does not define the word "challenge," courts have held "[a] suit challenges a remedial action within the meaning of 113(h) if it interferes with the implementation of a CERCLA remedy." *Broward Gardens Tenants Ass'n v. United States Envtl. Prot. Agency*, 311 F.3d 1066, 1072 (11th Cir. 2002); *see Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998). "To determine whether a suit interferes with, and thus challenges, a cleanup, courts look to see if the relief requested will *impact the remedial action selected*." *Broward Gardens Tenants Ass'n*, 311 F.3d at 1072 (emphasis added).

Further, in *McClellan Ecological Seepage Situation v. Perry*, the Ninth Circuit, in holding that the plaintiffs' citizen suit claims were barred by CERCLA's timing-of-review provision, held that vindication of those claims would create "new requirements for dealing with the inactive sites that are now

subject to the CERCLA cleanup [and] clearly interfere with the cleanup." 47 F.3d 325, 329-330 (9th Cir. 1995); *see also Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995) (holding no jurisdiction to entertain potentially responsible party citizen suit where successful suit would "dictate specific remedial actions and . . . alter the method and order for cleanup"). Additionally, the Tenth Circuit, in *New Mexico v. General Electric Co.*, held that a challenge was related to the goals of the cleanup because "the State's lawsuit calls into question the EPA's remedial response plan." 467 F.3d 1223, 1249 (10th Cir. 2006).

The Cannons' suit is not a "challenge" as defined by the courts. Their suit, if successful, would not create new requirements for dealing with their property, interfere with the cleanup, or dictate specific remedial actions for their property. Because, as explained below, the federal government has not selected a removal or remedial action under Section 104 of CERCLA, there is no cleanup underway at the Cannons' property. Therefore, it is impossible for the Cannons' suit to interfere with or "challenge" a removal or remedial action selected by the federal government. The sole impact of the Cannons' suit, if successful, is that the environmental studies begun in the 1970s would finally be completed, and, if necessary, a removal or remedial action would be selected for their property and the cleanup would begin. This is not a "challenge" to a removal or remedial action selected under Section 104 of CERCLA for purposes of CERCLA's timing-of-review provision. This is simply

an effort to compel the federal government to do what it is statutorily required to do; that is, to conduct and complete environmental studies to determine whether a hazardous waste response action is required and, if so, to implement the response in a timely manner.

2. The superficial actions of the Corps of Engineers do not constitute a "removal" or "remedial" action.

In CERCLA, Congress expressly created a two-category system of hazardous substance response: removal and remedial actions. A "removal" action is defined as any measure taken to "prevent, minimize, or mitigate damage to the public health welfare or to the environment." 42 U.S.C. § 9601(23) (App. 29). A removal action generally is thought of as short-term, interim action taken to prevent imminent harm and to keep a release of contaminants from getting worse. *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986); *Gen. Elec. Co. v. Envtl. Prot. Agency*, 360 F.3d 188, 189 (D.C. Cir. 2004) (*per curiam*). A "remedial" action, on the other hand, refers to the permanent remedy for a site, and generally comprises long-term treatment or containment of the hazardous substance. *Id.*; 42 U.S.C. § 9601(24) (App. 30-31).

The distinction between a "remedial" action and a "removal" action is significant in three principal contexts: (1) each is subject to different requirements

under the National Contingency Plan ("NCP");[6] (2) a remedial action that is financed by the Superfund requires listing on the National Priorities List ("NPL") prior to action, while a removal does not; and (3) CERCLA provides for different limitation periods for the recovery of remedial versus removal action costs. *See* Anderson, *supra* note 6 (providing an analysis of the differing uses of "removal" and "remedial" actions under CERCLA).[7]

---

[6] The NCP tries to balance concerns for health, safety, and the environment with fairness to PRPs and other interested parties. Because an urgent response generally is required for a removal action, the NCP places fewer restraints on that type of action. *See* 40 C.F.R. § 300.700(c)(4). For a remedial action, however, the goals of fairness and efficiency are served best by more careful contemplation of risks and response alternatives; accordingly, the NCP imposes greater requirements for a remedial action. The NCP requires far more for a remedial action in terms of planning, choice of action, and public comment than it does for a removal action. For example, to be consistent with the NCP, the remedial alternative selected will be evaluated on its effectiveness, implementability, and cost effectiveness. 40 C.F.R. § 300.430(e)(9)(*iii*), 300.430(i). "The differences grow primarily from the assumption that removal actions must be taken quickly, without the delay associated with extensive study and public comment." Jerry L. Anderson, *Removal or Remedial? The Myth of CERCLA's Two Response System*, 18 Colum. J. Envtl. L. 103, 112 (1993).

[7] The distinction between removal and remedial actions is, in part, to protect PRPs from unnecessarily broad response actions, *i.e.*, a remedial action guised as a removal. That is, the Environmental Protection Agency's authority to conduct a short-term removal action must be balanced with the PRP's interests in not being forced to pay for a response action beyond that

(Continued on following page)

In the instant case, the cursory actions of the Corps of Engineers are neither a removal nor a remedial action. Sixty-three years have lapsed since the federal government contaminated the Cannons' property. In that time, the Corps of Engineers, from time to time, has "investigated" the contamination on the property. The most recent investigation resulted in the 1996 draft EE/CA, which was never finalized. Because of the lengthy delay and history of on-again, off-again studies, the Corps of Engineers cannot reasonably claim now that its actions constitute a "removal" action as defined under CERCLA. *See* 42 U.S.C. § 9601(23) (App. 29-30). Moreover, the Corps of Engineers's cursory actions cannot constitute a "remedial" action as that term is statutorily defined. *See id.* § 9601(24) (App. 30-31). The Corps of Engineers has not followed any of the procedural prerequisites mandated for selection of a remedial action, and, thus, cannot now claim their actions are linked to a remediation of the Cannons' property. Indeed, no action has been taken on the Cannons' property that constitutes a removal or remedial action as those terms have been interpreted by the courts, the EPA, or CERCLA practitioners. Accordingly, the Tenth Circuit erred in holding the Corps of Engineers was conducting a removal action on the Cannons' property.

---

necessary to prevent imminent harm to human health or the environment.

3. The Corps of Engineers did not "select" a removal or remedial action.

The Corps of Engineers has the choice of three removal actions at formerly used defense sites[8] such as the Cannons' property: (1) emergency; (2) time-critical; or (3) non-time-critical. United States Army Corps of Eng'rs, *Formerly Used Defense Sites (FUDS) Program Policy*, Reg. No. 200-3-1, at 4-18 (May 10, 2004) (App. 38). "Emergency removal actions address immediate, unacceptable hazards or risks and must commence within hours of discovery." *Id.* (App. 39). A time-critical removal action "is a removal action for which less than six months planning time is available before on-site activities must begin." *Id.* at 4-20 (App. 41). Non-time-critical removal actions allow at least six months before on-site activities are to be initiated. *Id.* at 4-21 (App. 43). Because of the lengthy delay between contamination of the site and its eventual cleanup, any response action undertaken by the Corps of Engineers on the Cannons' property can only be a non-time-critical removal, which requires the issuance of an EE/CA Approval Memorandum before this option is "selected." *Id.* (App. 43-44). ("[A]n EE/CA Approval Memorandum is required by [Formerly Used Defense Sites] policy to document the rationale to conduce a removal action and is prepared once the need for a [non-time-critical removal

---

[8] *See* 10 U.S.C. § 2701(c) (charging the Secretary of Defense with the responsibility to carry out CERCLA response actions, *inter alia*, on property leased by the United States).

action] has been determined."). The mandatory EE/CA Approval Memorandum is to be produced following completion of a site investigation. *Id.* (App. 45). Finally, the EE/CA Approval Memorandum provides the Corp of Engineers's recommendation for whether a cleanup is required. *Id.* (App. 44). In the instant case, the Corps of Engineers has not produced this required document and thus could not have "selected" a removal action.

Moreover, when looking at the language of a statute, a court must "assume" that congressional intent is reflected in the ordinary meaning of the words used. *United States v. Labonte*, 520 U.S. 751, 757 (1997) (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *Russello v. United States*, 464 U.S. 16, 21 (1983). Given the plain meaning of the term "selected," Congress clearly intended the federal government "to take by preference from among others," when "selecting" a removal or remedial action. *Black's Law Dictionary* 1359 (6th ed. 1995) (defining "selected" as "To take by preference among others; to pick out; to cull."). In the instant case, the Corps of Engineers has not outlined any options from which it could select a removal or remedial action at the Cannons' property. Therefore, the Corps of Engineers has not "selected" a removal or remedial action, as required before Section 113(h) withdraws jurisdiction, nor could it have selected any such action. Thus, the federal government may not escape judicial review by redefining federal law to fit its needs of the moment. *See Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute.").

B. The Tenth Circuit's Decision Created a Split with the Seventh Circuit's Holding in *Frey v. Environmental Protection Agency*.

Prior to the instant case, no court has expressly answered the question of what happens when the federal government drags its feet on a mandated cleanup for more than 63 years. The Seventh Circuit, however, addressed a shorter delay in *Frey v. Environmental Protection Agency*, where citizens brought an action against the Environmental Protection Agency ("EPA") and PRPs to cleanup toxic waste dumps. 403 F.3d 828 (7th Cir. 2005) (*Frey II*). The EPA had completed removal and remedial actions at the site, which had been selected under Section 104 of CERCLA. *Id.* at 833-834. When the lawsuit commenced, the EPA was planning the next stage of the cleanup process. *Id.* at 831-834. The United States District Court for the Southern District of Indiana held Frey's suit was barred by Section 113(h) of CERCLA because "active remedial planning was underway" by the EPA. *Id.* at 833 (internal citation omitted).

"At oral argument [before the Seventh Circuit], EPA's counsel argued that the agency's ongoing investigation and testing of groundwater and soil contamination precludes review under [CERCLA]." *Id.* at 834. This simplistic argument caused the court to conclude that the "EPA considers itself protected from review under CERCLA [Section] 113(h) as long as it has any notion that it might, some day, take

further unspecified action with respect to a particular site." *Id.* The court then held, "There is no support in the statute for such an open-ended prohibition on a citizen suit." *Id.* Further, "[f]*or EPA to delay Frey's suit, it must point to some objective referent that commits it and other responsible parties to an action or plan.*" *Id.* (emphasis added). Moreover, the court demanded "a timetable or other objective criterion to assess when EPA's amorphous study and investigation phase may end." *Id.* at 834-835.

"[T]he time limits in § 113(h) are 'geared to concrete, existing, remedial measures; not measures that might be devised at some future date.'" *Frey II*, 403 F.3d at 832, (quoting *Frey v. Environmental Protection Agency*, 270 F.3d 1129, 1134 (7th Cir. 2001) (*Frey I*)). For the federal government to delay the Cannons' suit, it had to "point to some objective referent that commits it and other responsible parties to an action or plan." *Id.* As in *Frey II*, the federal government failed in this showing.[9] There is no

---

[9] The Tenth Circuit held that the United States has "already undertaken several steps toward determining how it will address the contamination present on the Cannons' property." *Cannon II*, 538 F.3d at 1334 (App. 14) (noting that a preliminary assessment, Archive Search Report, and draft EE/CA were completed). Because of the excessive and unreasonable delay, however, the Corps of Engineers would be hard pressed to argue that it is conducting an on-going removal action. After all, more than 12 years have lapsed since the last action, which is hardly indicative of a short-term, interim action taken to prevent imminent harm and to keep a release of contaminants from getting worse. *Exxon Corp.*, 475 U.S. at 360.

concrete plan of action in existence that outlines when response measures, if any, might proceed. Indeed, "[t]here is no timetable or other objective criterion by which to assess when [the Corps of Engineers's] amorphous study and investigation phase may end." *Id.* Nonetheless, under the Tenth Circuit's holding, the federal government is insulated from judicial review under CERCLA's timing-of-review provision as long as it has any notion that it might, some day, take further unspecified action with respect to a particular site.[10]

Although the Seventh Circuit did not provide express guidance regarding the impact of the EPA's delay, the opinion's language regarding unreasonable agency delay under the APA and "finally" giving the plaintiffs their "day in court" indicates that the agency's delay was a factor. *Frey II*, 403 F.3d at 829 ("Frey is finally entitled to her day in court."); *id.* at 836 ("After a very long wait, the citizens of Bloomington are finally entitled to their day in court."). Moreover, the primary reason for adding Section 113(h) was to avoid litigation that delayed the agency's response. Perhaps the EPA's long period of inactivity led the *Frey II* court to believe that litigation on the

[10] The Seventh Circuit noted that a 100-year plan for site remediation would be unreasonable *Frey II*, 403 F.3d at 835. Likewise, the 63-year delay in the issuance of a site remediation plan for the Cannons' property is equally unreasonable. Moreover, even a generous estimate reveals a history of agency inaction of more than 12 years since the issuance of the draft EE/CA in August 1996.

merits would not be the primary cause of additional delay. Since the EPA was foot dragging anyway, it would have been disingenuous for the agency to assert that litigation would cause additional delay. Regardless, here, as in *Frey II*, it is disingenuous for the federal government to claim that judicial review, as sought by the Cannons, would result in delay in cleaning up the Cannons' property since, in the more than 63 years following contamination of the property, the Corps of Engineers has not so much as issued a final site inspection work plan, let alone begun any objective response or remediation.

The conflict between the holding of the Seventh Circuit in *Frey II* and the Tenth Circuit's perpetual bar to judicial review becomes clearer when reviewing the federal government's unreasonable delay in cleaning up the Cannons' property. The draft 2006 Site Inspection Work Plan provides no "external evaluation, with reasonable target completion dates, of the required work for the site." *Frey II*, 403 F.3d at 835. The draft 2006 Site Inspection Work Plan, which is not a plan for how the Corps of Engineers intends to clean up the Cannons' property or even a plan for how the Corps will select a removal or remedial action pursuant to Section 104 of CERCLA, falls far short of providing "reasonable target completion dates[ ] of the *required* work for the site." *Id.* (emphasis added). Indeed, the draft 2006 Site Inspection Work Plan is merely a "desultory testing and investigation process of indefinite duration." *Id.* Thus, this Court should grant this Petition in order to clarify

this important issue of federal law and rectify the split between the Seventh and Tenth Circuits.

II. THIS COURT SHOULD GRANT THE PETITION TO ESTABLISH THAT THE PREENFORCEMENT REVIEW PROVISION OF CERCLA WAS NOT DESIGNED TO SERVE AS A CATEGORICAL BAR TO ACTIONS SEEKING TO COMPEL A TIMELY CLEANUP.

"Congress intended to prevent time-consuming litigation that might interfere with CERCLA's overall goal of effecting the *prompt* cleanup of hazardous waste sites." *Broward Garden Tenants Ass'n v. United States Envtl. Prot. Agency*, 157 F.Supp.2d 1329, 1337 (S.D.Fla. 2001) (emphasis added). Notwithstanding Congress's intent regarding the timing-of-review provision contained in Section 113(h), the Tenth Circuit allowed the federal government to use Section 113(h) as a shield to insulate from judicial review the federal government's failure over the last 63 years to take action to clean up the Cannons' property.

Indeed, the Tenth Circuit's ruling results in a perverse reading of the statute that is not what Congress intended when it enacted Section 113(h) of CERCLA. The purpose of the bar on preenforcement review is to prevent litigation that may delay the rapid cleanup of a hazardous waste site. *Broward Garden Tenants Ass'n*, 157 F.Supp.2d at 1337. Here, the Cannons have been suffering from hazardous waste on their property since 1945. For the past 63

years, the Cannon family has been adversely affected by the federal government's contamination of the Cannons' property and the federal government's perpetual delay in cleaning up the property, as it was contractually, morally, and now statutorily, obligated to do. During the past 63 years, the Cannons have done nothing to delay the cleanup but, ironically, that is what the Tenth Circuit's ruling will allow the federal government to do. The federal government now has *carte blanche* authority to continue its desultory investigation process of indefinite duration. It now has the legal justification to delay the cleanup of Cannons' property for as long as it wishes because the Tenth Circuit held there is no legal recourse for the Cannons. This is exactly what Congress sought to avoid by enacting Section 113(h) of CERCLA:

> [P]re-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.

S. Rep. No. 99-11, at 58. As the record in this case underscores, the Cannons' property cries out for a federal court to assert jurisdiction to oversee and establish deadlines in the CERCLA process, as so many other federal courts do at PRP-led CERCLA responses, to ensure that the Corps of Engineers develops a comprehensive plan to evaluate the environmental conditions on and beneath the Cannons'

property, completes the necessary studies and evaluations, and determines whether a response action is required and, if so, how and when the cleanup will be completed.

In this case, the federal government is the polluter, the responsible party, and the delaying party. The Cannons seek merely to exercise their statutory rights to compel a cleanup of their property and to end the serious, ongoing threat to public health and the environment contained on their property. Under the Tenth Circuit's interpretation, actions seeking to compel the federal government to clean up private property will become family obligations passed down from generation to generation until finally those great-grandchildren that survive may come into court and present their case.

In fact, this is precisely what the federal government has succeeded in doing in this case. Jesse Fox Cannon was unsuccessful in his quest to compel the cleanup of his property. Upon his death, his son, Dr. J. Floyd Cannon unsuccessfully carried the torch. Now the grandchildren, F. Douglas, Margaret Louise, and Allan Robert Cannon, are left to challenge the federal government's inaction. One would hope the Cannons' property would be cleaned up before Jesse Fox's great-grandchildren find themselves in court.

If the Tenth Circuit's interpretation of CERCLA's timing-of-review provision is upheld, the primary purpose of CERCLA, *i.e.*, the prompt cleanup of the Nation's hazardous waste sites, will be defeated. This

purpose has already been severely compromised by the 63-plus years of delay resulting from the federal government's refusal to accept responsibility for its contamination of the Cannons' property.

Equity urges allowing injured parties such as the Cannons to protect themselves through the federal courts, especially where an agency's unreasonably prolonged inaction endangers their well-being. The bar on preenforcement review codified in the timing-of-review provision may be a sound rule, in general; however, even if its application by the Tenth Circuit were what Congress intended, like all rules, there must be exceptions for extraordinary situations. This case involves just such an extraordinary situation; thus, judicial review should have been granted. Moreover, the Tenth Circuit's application of the bar on preenforcement review, as is made clear above, is not what Congress intended. Thus, this Court should grant this Petition in order to address this significant issue of unresolved federal law.

CONCLUSION

For the foregoing reasons, the Cannons respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted by,

RONALD W. OPSAHL*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

HAL J. POS
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 532-1234

Attorneys for Petitioners

Dated: November 21, 2008

APPENDIX

Page

Cannon v. Gates, No. 07-4107, Opinion (10th Cir. Aug. 26, 2008) ..... App. 1

Cannon v. Gates, No. 05-922, Order (D.Utah Apr. 5, 2007) ..... App. 19

42 U.S.C. § 9601(23), (24) ..... App. 29

42 U.S.C. § 9604(a)(1) ..... App. 32

42 U.S.C. § 9613(h) ..... App. 34

United States Army Corps of Eng'rs, *Formerly Used Defense Sites (FUDS) Program Policy*, Reg. No. 200-3-1 (May 10, 2004) (excerpt) .... App. 36

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

F. DOUGLAS CANNON; MARGARET LOUISE CANNON; ALLAN ROBERT CANNON, Plaintiffs-Appellants, v. ROBERT M. GATES, Secretary, United States Department of Defense; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE ARMY; UNITED STATES OF AMERICA, Defendants-Appellees.	No. 07-4107

Appeal from the United States District Court for the District of Utah (D.C. No. 2:05-CV-00922-DB)

(Filed Aug. 26, 2008)

Ronald Walter Opsahl (Joshua D. McMahon and William Perry Pendley with him on the brief), Mountain States Legal Foundation, Lakewood, Colorado, for Plaintiffs-Appellants.

Stacey W. Person, U.S. Department of Justice, Environment and Natural Resources Division (Ronald J. Tenpas, Acting Assistant Attorney General, Daniel Pinkston and Elizabeth A. Peterson, U.S. Department of Justice, Environment and Natural Resources Division, and Tracy Gruis, of Counsel, Office of the Chief Counsel, U.S. Army Corps of Engineers, with her on the brief), Washington, D.C., for Defendants-Appellees.

Before **LUCERO**, **HOLLOWAY**, and **EBEL**, Circuit Judges.

EBEL, Circuit Judge.

Plaintiffs-Appellants F. Douglas Cannon, Allan Robert Cannon, and Margaret Louise Cannon (the "Cannons") brought suit against the Defendants-Appellees claiming two violations of the Solid Waste Disposal Act and one violation of the Administrative Procedures Act. The district court dismissed the case for lack of subject matter jurisdiction pursuant to the jurisdiction-stripping provision at 42 U.S.C. § 9613(h). We conclude that the district court properly applied § 9613(h) because the Cannons' suit constitutes a challenge to the Government's selected removal action, and therefore AFFIRM the dismissal.

I.

Jesse Fox Cannon owned over 1,416 acres of land in Tooele County, Utah. Cannon's land was adjacent to the Army's Dugway Proving Grounds.[1] In 1945, Cannon entered into a six-month lease with the United States War Department, which provided that, in return for one dollar, Cannon would permit the Government to enter onto his land "in order to survey and carry out such other exploratory work as may be necessary in connection with the property; to erect buildings and any other type of improvement; and to perform construction work of any nature." The Government agreed that, at the expiration of the lease, it would "leave the property of the owner in as good condition as it is on the date of the government's entry."

Government officials then entered onto Cannon's land to conduct Project Sphinx, which was designed to test "means of battling Japanese forces entrenched in caves in the Pacific Islands." *Cannon v. United States,* 338 F.3d 1183, 1184 (10th Cir. 2003). As part of that testing, the Government used incendiary weapons, including aviation fuel, butane, gasoline, napalm, PT jell, and napalm-gas mixtures. The Government also used chemical weapons, such as phosgene, hydrogen cyanide, mustard gas, and defoliants.

---

[1] The Cannon property is located within the "Yellow Jacket Mines area," which is immediately adjacent to the Proving Grounds.

Finally, the Government dropped conventional bombs on Cannon's property, including 12,000-pound Fall Boy bombs and Tiny Tim rockets. In all, the Government used at least 3,000 rounds of ammunition and twenty-three tons of chemical weapons in the tests it conducted on Cannon's property. *See Cannon,* 338 F.3d at 1185 n.1.

After completing its tests, "[t]he Army failed to keep its promise to clean up Cannon's property." *Cannon,* 338 F.3d at 1185. When Cannon reentered the land in September 1945, "the entire area [was] liberally covered with shell, rocket, and bomb fragments. . . ." *Id.* at 1185 & n.2 (internal quotation marks omitted). In September and October 1945, Cannon filed two administrative claims with the Government. For the first claim, the Government paid Cannon $755.48 for disrupting mining activities, and for the second, the Government paid Cannon $2,064 for the destruction of mine shaft timbering. *See id.* at 1185. Cannon then filed a third claim with the Government in 1950, asserting that he had been unable to lease his mines because they were still filled with what appeared to be poisonous gas. *See id.* The Government denied that claim. *See id.*

Over the years, Cannon's son, Dr. J. Floyd Cannon, unsuccessfully requested that the Government clean up the property. *Id.* Beginning in the 1970s, the Government initiated efforts to study the contamination at the adjacent Dugway Proving Grounds, and included the Cannon property in some of these efforts. *See id.* at 1185-86. The Government, however,

did not clean up the Cannon property at that time, and has yet to do so. *Id.* at 1188.

Frustrated by the slow progress in the Government's clean up efforts, two of Dr. Cannon's children, who then owned 75% of the Cannon property at issue here, sued the United States in 1998 under the Federal Tort Claims Act ("FTCA"). *See id.* Following a bench trial, the district court found that the Government had diminished the value of the Cannons' land from $176.26 to $25 an acre, and awarded them $160,937 in damages. *See id.* at 1189. This court, however, reversed that judgment and held that the statute of limitations barred the Cannons' FTCA claims. *See id.* at 1184, 1189-94.

In November 2005, the Cannons tried a different approach. Three of Dr. Cannon's children who currently own the land at issue – F. Douglas Cannon, Allan Robert Cannon and Margaret Louise Cannon – sued the United States, the Department of Defense, the Department of the Army, and the Secretary of Defense (collectively "the United States"), seeking to use federal environmental protection laws to force the United States to clean up the Cannons' property. To that end, the Cannons alleged two claims under the Solid Waste Disposal Act ("SWDA").[2]

---

[2] The SWDA, 42 U.S.C. §§ 6901-81, amended the Resources Conservation and Recovery Act of 1976 ("RCRA"). *See United States v. Colorado*, 990 F.2d 1565, 1568 (10th Cir. 1993). The parties often refer to these claims as RCRA claims. Both of the

(Continued on following page)

The Cannons pursued their first SWDA claim under 42 U.S.C. § 6972(a)(1)(A), which permits "any person" to

> commence a civil action on his own behalf –
>
> > (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment of the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter. . . .

42 U.S.C. § 6972(a). In support of this claim, the Cannons alleged that the United States was in violation of federal and Utah regulations applicable to generators of hazardous waste.

The Cannons asserted their second SWDA claim under 42 U.S.C. § 6972(a)(1)(B), which provides that "any person" can

> commence a civil action on his own behalf
>
> . . . .

Cannons' RCRA claims, asserted under 42 U.S.C. § 6972(a), are referred to as RCRA citizen suits. *See Colorado*, 990 F.2d at 1573 n.12, 1577-78.

> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past and present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . .

42 U.S.C. § 6972(a)(1)(B). In support of this claim, the Cannons alleged that the United States has contributed to conditions on their property that endanger the Cannons, other individuals mining on the property, and members of the general public who come onto the Cannons' property. Those dangers include unexploded ordnance and poisonous chemical agents.

In addition to their two SWDA claims, the Cannons also asserted a claim under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706. That APA provision permits a court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

The district court dismissed the Cannons' claims, holding that 42 U.S.C. § 9613(h) deprived federal courts of jurisdiction to consider those claims. Briefly

stated here, § 9613(h) deprives federal courts of jurisdiction to consider "any challenges to removal or remedial action selected" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). In dismissing these claims, the district court concluded that the United States had already "selected" a "removal" action addressing the Cannons' property through the United States' preliminary efforts to investigate whether clean up efforts were needed. The Cannons appeal that decision.

II.

The district court dismissed this action at the summary-judgment stage of this litigation. This court, therefore, will review the district court's decision *de novo*. *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1241 (10th Cir. 2006); *see also Gen. Elec. Co. v. EPA*, 360 F.3d 188, 191 (D.C. Cir. 2004).

A.

"Congress enacted CERCLA to provide a mechanism for the prompt and efficient cleanup of hazardous waste sites." *United States v. City and County of Denver*, 100 F.3d 1509, 1511 (10th Cir. 1996). "CERCLA protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." *Gen. Elec.*, 467 F.3d at 1249 (internal quotation marks omitted) (quoting *McClellan Ecological Seepage Situation v. Perry*, 47

F.3d 325, 329 (9th Cir. 1995)). CERCLA accomplishes this through 42 U.S.C. § 9613(h), which provides, in pertinent part:

> *No Federal court shall have jurisdiction under Federal law* other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) *to review any challenges to removal or remedial action selected under section 9604 of this title,* or to review any order issued under 9606(a) of this title, in any action except [if certain listed exceptions apply]. . . .

42 U.S.C. § 9613(h) (emphasis added).

"In enacting this jurisdictional bar, Congress intended to prevent time-consuming litigation which might interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites." *City and County of Denver,* 100 F.3d at 1514. "[T]he obvious meaning of § 9613(h) is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." *Gen. Elec.*, 467 F.3d at 1249 (internal quotation marks omitted). Section 9613(h), however, does not preclude actions to challenge a remedial plan *after* that plan has been completed. *See id.*

This case implicates § 9613(h) because the Cannons asserted claims under federal law – RCRA and the APA. The parties concede that none of § 9613(h)'s

exceptions apply. Further, the parties agree that this case involves agency action taken under 42 U.S.C. § 9604, rather than 42 U.S.C. § 9606(a).[3] Therefore, we must resolve two questions to determine whether § 9613(h)'s jurisdictional bar applies to this case: (i) whether the United States has "selected" a "removal or remedial action" under 42 U.S.C. § 9604; and, if so, (ii) whether the Cannons' claims present a "challenge" to that removal or remedial action.

B.

Our analysis of whether the United States selected a removal or remedial action "begin[s] and end[s] with the language of [§ 9613(h)]. . . ." *Gen. Elec.*, 360 F.3d at 191; *see also Colorado*, 990 F.2d at 1577 (reviewing only the "plain language" of § 9613(h)). "This 'clear and unequivocal' provision is a 'blunt withdrawal of federal jurisdiction' over challenges to ongoing CERCLA removal actions. . . ." *APWU v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003) (quoting *McClellan*, 47 F.3d at 328). According to its

---

[3] These two provisions of CERCLA, 42 U.S.C. §§ 9604 and 9606, "authorize the President and his designees to initiate cleanup operations." *Pollack v. United States Dep't of Defense*, 507 F.3d 522, 525 (7th Cir. 2007). Section 9604 "allows the President to undertake cleanups," while § 9606 instead "allows the President to command potentially responsible private parties to clean up their own hazardous messes." *Id.* Section 9606, therefore, involves abatement actions taken by the United States against responsible parties. This case does not implicate § 9606.

plain language, § 9613(h) strips federal court jurisdiction once the Government has begun a removal action. *See, e.g., Boarhead Corp. v. Erickson,* 923 F.2d 1011, 1023 (3d Cir. 1991).

In the instant case, the Government's authority to begin removal actions depends on 42 U.S.C. § 9604, which enables the Government to respond to releases, or the substantial threat of a release, of hazardous substances into the environment. Section 9604(a)(1) authorizes the President to take removal or other remedial action which the President "deems necessary to protect the public health or welfare or the environment."[4] Section 9604(b)(1) provides that,

> [w]henever the President is authorized to act pursuant to subsection (a) . . . *he may undertake such investigations, monitoring, surveys, testing and other information gathering as he may deem necessary or appropriate to*

---

[4] Although the President has delegated most of his authority under CERCLA to the EPA, he has delegated his CERCLA authority over Department of Defense sites instead to the Secretary of Defense ("Secretary"). *See Colorado,* 990 F.2d at 1571 n.9. Pursuant to that authority, the Secretary cleans up "formerly used defense sites" pursuant to the Defense Environmental Restoration Program, 10 U.S.C. §§ 2700-08. 10 U.S.C. § 2701(c) requires the Secretary to undertake action in response to such hazardous waste sites in accordance with CERCLA. Therefore, the parties concede that the Defense Environmental Restoration Program "uses a cleanup process consistent with CERCLA and the National Contingency Plan, 40 C.F.R. Part 300," and thus, that 42 U.S.C. §§ 9604 and 9613(h) apply to this case.

> *identify the existence and extent of the release or threat thereof,* the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

42 U.S.C. § 9604(b)(1) (emphasis added).

In turn, CERCLA defines removal actions as:

> The terms "remove" or "removal" mean[ ] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, *such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances,* the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened

> individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. § 5121 et seq.].

42 U.S.C. § 9601(23) (footnote omitted) (emphasis added). On the other hand, CERCLA defines

> [t]he terms "remedy" or "remedial action" [to] mean[ ] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. . . .

Id. § 9601(24).

The statutory definition of a removal action dictates that a removal action is ongoing and thus, that § 9613(h)'s jurisdiction strip applies, even if the Government has only begun to "monitor, assess, and evaluate the release or threat of release of hazardous substances." *See Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995) (holding that § 9613(h) stripped federal jurisdiction because the EPA had completed a remedial investigation and feasibility study, which constituted "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances");

Boarhead, 923 F.2d at 1016, 1023 (concluding that § 9613(h) applied because the EPA had given the plaintiff notice that it intended to study the release of hazardous substances at the plaintiff's farm).

In the instant case, the Government's removal actions are therefore sufficient to trigger § 9613(h). The Government has already undertaken several steps toward determining how it will address the contamination present on the Cannons' property. First, the Government has completed a preliminary assessment of the property. As part of this preliminary assessment, the Government conducted an "Archive Search Report" that compiled historical records, interviews, and site surveys to determine the exact nature of the military testing conducted on the Cannons' property. Based on the Archive Report, the Government then prepared and issued a "Draft Formerly Used Defense Site Engineering Evaluation/Cost Analysis Report." This draft report indicated that the Cannons' property was in fact highly contaminated.[5] *Cannon,* 338 F.3d at 1187-88. Finally, the record also indicates that the Government was planning its site inspection while this suit was pending before the district court.[6] These steps constitute

---

[5] The Government never finalized this draft report due to several concerns, including funding limitations. The failure to finalize this report, however, did not stall the Government's administrative process because the report was merely a collateral step.

[6] The Government moved for us to take judicial notice of the final site inspection plan. This document is not necessary for the

(Continued on following page)

the Government's efforts thus far to "monitor, assess, and evaluate" the hazardous substances on the Cannons' land, and therefore qualify as an ongoing removal action. Accordingly, we conclude that the Government has selected a removal action and thus triggered § 9613(h).

Contrary to this conclusion, the Cannons assert that the Government's conduct up to this point does not trigger § 9613(h) because the Government has not officially selected a removal or remedial action pursuant to the applicable regulations. The Cannons specifically contend that the Government has not selected a removal action until it has complied with the full panoply of the applicable regulations, which require the Government to conduct a site inspection, issue an engineering evaluation and cost assessment report, take public comments, and finally make a decision about the removal action based on the administrative record. *See* 40 C.F.R. § 300.415. We find this argument to be unpersuasive because it unduly restricts the plain language of § 9613(h). That section is a "blunt withdrawal" of the jurisdiction of federal courts, which applies once the Government has begun its removal action. *See Potter,* 343 F.3d at 624. Nothing in the statutory language suggests that Congress intended this jurisdiction-stripping provision to apply only once the Government has completed a

---

resolution of this appeal, and accordingly, we DENY the Government's motion.

substantial portion of its removal proceedings. *See Razore,* 66 F.3d at 239 (concluding that an interim step in the removal selection process – the preparation of an remedial investigation/feasibility study report – constituted an ongoing removal action sufficient to trigger § 9613(h)); *Boarhead,* 923 F.2d at 1023 (holding that § 9613(h) applied because the EPA had begun sufficient removal proceedings once it had communicated its *intent to conduct* a remedial investigation/feasibility study).[7] Therefore, we remain convinced that the district court properly concluded that the Government had selected a removal action pursuant to its authority under § 9604.[8]

In spite of the Cannons' argument, neither *Boarhead* nor *Razore* rely on (or even mention during the analysis) the placement of the properties on the NPL.

---

[7] We recognize that this conclusion splits with the Seventh Circuit's holding in *Frey v. EPA,* 403 F.3d 828 (7th Cir. 2005). While we share the Seventh Circuit's concern regarding open ended remedial and removal actions undertaken by the Government, we conclude that the plain language of the statute mandates the result we reach here.

[8] In their reply brief, the Cannons assert that neither *Boarhead* nor *Razore* support the conclusion that a removal action commenced once the Government began monitoring, assessing, and evaluating the Cannons' property. The Cannons attempt to distinguish both cases by noting that those cases involved property that the EPA had previously listed on the National Priorities List ("NPL"). That fact, they assert, implicitly demonstrates that the EPA had completed all of the necessary regulatory steps to select a removal action.

Thus, we find the Cannons' attempts to distinguish the reasoning from these two cases unpersuasive.

C.

Section 9613(h) applies only to "*challenges* to removal or remedial action." 42 U.S.C. § 9613(h) (emphasis added). A lawsuit challenges a removal action if it "calls into question [that removal] plan." *Gen. Elec.*, 467 F.3d at 1249. In other words, a suit challenges a removal action if it "interferes with the implementation of a CERCLA remedy" because "the relief requested will impact the [removal] action selected." *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1072 (11th Cir. 2002); *see also Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998) (holding that a qui tam suit for monetary damages only against contractors engaged in a clean-up effort was not a challenge because it would not impact the removal action selected).

Turning to the instant case, there is no doubt that the Cannons' suit constitutes a challenge. The Cannons requested injunctive relief ordering the remediation of their property. Such relief would undoubtedly interfere with the Government's ongoing removal efforts. *See Alabama v. EPA*, 871 F.2d 1548, 1559 (11th Cir. 1989) (holding that a suit requesting injunctive relief constituted a challenge for the purposes of § 9613(h)). Therefore, we conclude that the Cannons' suit challenges the Government's ongoing removal action for the purposes of § 9613(h).

The Cannons attempt to avoid the broad standard for what constitutes a challenge by arguing that the cases applying that standard are inapposite because the Government has not yet selected a removal action. This argument merely rehashes the Cannons' earlier contention that a removal action begins only after the Government has selected it pursuant to the regulatory provisions at 40 C.F.R. § 300.415. Accordingly, the argument suffers a similar fate. As we noted above, the broad statutory language indicates that Congress intended to strip federal jurisdiction from any challenge that would interfere with an ongoing removal or remediation process. *See, e.g., Potter,* 343 F.3d at 624. Here, the Government's conduct constitutes an ongoing removal action, with which the Cannons' suit would undoubtedly interfere. Thus, the case at bar constitutes a challenge.

III.

The Cannons' suit sought to hasten the Government's cleanup efforts through injunctive relief. We are sympathetic to the Cannons' frustration with the long delays; however, their suit falls within the broad ambit of § 9613(h). Accordingly, we AFFIRM the district court's decision to dismiss the case. In addition, we DENY the Government's motion to take judicial notice of the final inspection plan.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

F. DOUGLAS CANNON; MARGARET LOUISE CANNON; ALLAN ROBERT CANNON, Plaintiffs, v. ROBERT M. GATES, Secretary, U.S. Department of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF THE ARMY; UNITED STATES OF AMERICA, Defendants.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING ACTION WITHOUT PREJUDICE Case No. 2:05-cv-00922 The Hon. Dee Benson (Filed Apr. 5, 2007)

On March 20, 2007, the Court held a hearing on the motion for summary judgment filed by Defendants Secretary of Defense Robert M. Gates, the United States Department of Defense, the United States Army, and the United States of America (Docket Document No. 22). Daniel Pinkston, United States Department of Justice, appeared for Defendants, and Joshua D. McMahon, Mountain States Legal Foundation, and Hal J. Pos, Parsons, Behle & Latimer, appeared for Plaintiffs. After considering the briefs filed by the parties and the arguments of counsel, the court finds that there is no genuine issue of material fact and that Defendants are entitled to a judgment dismissing this action without prejudice as

a matter of law. Based on the pleadings, the summary judgment papers, the declaration and other documents attached thereto, and the arguments of counsel, the Court finds and concludes, based on undisputed facts, as follows:

This case involves patented mining claims of approximately 1,417 acres owned by Plaintiffs (the "Property") located in an area south of the Dugway Proving Ground in Tooele County, Utah. In May 1945, the then-owner of the Property, Jesse Fox Cannon (Plaintiffs' grandfather), granted the United States a right to enter the Property for a period of six months. Thereafter, from May to August 1945, the United States government, as part of "Project Sphinx," tested methods of attacking defenders in caves using conventional, chemical and incendiary weapons in an area including the Property. The area is known as the "Yellow Jacket Target Area," and is currently the subject of an investigation by the United States Army Corps of Engineers ("Corps") under the "Formerly Used Defense Sites" ("FUDS") program.

In their Amended Complaint, Plaintiffs set out three claims for relief The first claim for relief is brought pursuant to the "requirements violation" portion of the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(A)[1], in which Plaintiffs allege that

---

[1] This portion of the RCRA citizen suit statute provides that "any person" may bring a civil action "against any person

(Continued on following page)

Defendants' activities involving the Plaintiffs' Property have violated various RCRA and Utah state regulations.

The second claim for relief is brought under the "imminent and substantial endangerment" portion of the citizen suit provision of RCRA 42 U.S.C. § 6972(a)(1)(B).[2] Plaintiffs assert that Defendants, through Project Sphinx, "contributed and continue to contribute to the past or present handling, use, storage, treatment, transportation, or disposal of certain solid and/or hazardous wastes that present or may present an imminent and substantial endangerment to health or the environment on the Property."

Plaintiffs' third claim for relief is brought under the Administrative Procedure Act, 5 U.S.C. § 706(1),

---

(including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." 42 U.S.C. § 6972(a)(1)(A).

[2] 42 U.S.C. § 6972(a)(1)(B) allows "any person" to file suit "against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . ."

which states that a court shall compel "agency action unlawfully withheld or unreasonably delayed." Plaintiffs assert that Defendants' alleged failure to complete a cleanup of the Property is action unlawfully withheld or unreasonably delayed by the government.

In their prayer for relief, Plaintiffs seek declaratory judgment that Defendants contaminated the Property, that Defendants are in violation of RCRA and Utah regulations, and that Defendants have unlawfully withheld, and unreasonably delayed, the cleanup of the Property. Plaintiffs also request injunctive relief "including, but not limited to, an order for remediation of the solid and hazardous wastes disposed of on the Property by Defendants, as necessary to address the imminent and substantial endangerment to human health and the environment that currently exists and to restore the property to a safe and useful condition." *Id.*, at 10.

Defendants filed a motion for summary judgment on May 22, 2006, asserting that they are entitled to summary judgment dismissing this case because the FUDS activities being undertaken at the Yellow Jacket Site constitute a "removal or remedial action selected under" section 104 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9604, and that Plaintiffs' suit is a "challenge" to that removal or remedial action within the meaning of section 113(h) of CERCLA, 42 U.S.C. § 9613(h). Defendants argue that this Court does not have jurisdiction over this suit because section 113(h) withdraws jurisdiction

from the federal courts to consider challenges to removal or remedial action selected under CERCLA section 104.[3]

The scope of section 113(h) is broad, and bars citizen suits under any federal law, including RCRA,

---

[3] In section 113(h) of CERCLA, 42 U.S.C. § 9613(h), Congress established specific limitations on the subject matter jurisdiction of federal courts to entertain actions seeking judicial review of CERCLA response actions. Section 113(h) provides that:

> h. *Timing of review*
>
> No federal court shall have jurisdiction under federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:
>
> (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
>
> (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under section 9606(b)(2) of this title.
>
> (4) An action under section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
>
> (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(h)(1)-(5).

when the prerequisites to its application are met, *Arkansas Peace Center v. Arkansas Dep't of Pollution Control and Ecology,* 999 F.2d 1212, 1217-18 (8th Cir. 1993).

It is undisputed that the Corps has undertaken efforts to begin the site inspection process at the Yellow Jacket FUDS site, including having obligated funds for a contract for the work, providing a draft site inspection workplan to the Plaintiffs and the Utah Department of Environmental Quality ("UDEQ"), and soliciting rights-of-entry for properties involved in the investigation. These actions fall within the statutory definition of "removal," which includes activities to "monitor, assess, and evaluate the release or threat of release of hazardous substances," CERCLA section 101(23), 42 U.S.C. § 9601(23). These actions are also authorized pursuant to CERCLA section 104(b) as "investigations, monitoring, surveys, testing, and other information gathering . . . to identify the existence and extent of the release [of hazardous substances] or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or to the environment." 42 U.S.C. 9604(b). As a result, the activities undertaken and to be undertaken by the Corps at the Yellow Jacket FUDS site constitute a "removal or remedial action selected under" CERCLA section 104 within the meaning of section 113(h). No party has suggested that any of the five exceptions to the withdrawal of jurisdiction of section

113(h)(1)-(5) apply, and the Court concludes that none of them are applicable here.

A removal or remedial action taken by an agency under the delegation of Executive Order 12,580 (Jan. 23, 1987), such as the Corps' activities on the Property, is an action "under" CERCLA section 104, *APPWU, AFL-CIO v. Potter,* 343 F.3d 619, 625 (2nd Cir. 2003), including actions undertaken by the Corps at FUDS sites. *Shea Homes Limited Partnership v. United States,* 397 F.Supp.2d 1194, 1203 (N.D. Cal. 2005); *R.E. Goodson Construction Company, Inc. v. International Paper Co.,* No. C/A 4:02-4184-RBH, 2005 WL 2614927, at *22, n.35 (D.S.C. Oct. 13, 2005).[4]

---

[4] Pursuant to Executive Order 12,580 (Jan. 23, 1987), the President has delegated his authority to take action under CERCLA section 104(a) to the Secretary of Defense in circumstances where the release or threatened release is from a facility or vessel under the jurisdiction, custody or control of the Defense Department. In addition, under the Defense Environmental Restoration Program ("DERP") statute, 10 U.S.C. §§ 2700-2710, the Secretary of Defense is directed, in accordance with DERP and CERCLA, to carry out all response actions with regard to releases of hazardous substances from, among other facilities, "[e]ach facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances . . . " 10 U.S.C. § 2701(c)(1). This category of facilities includes "Formerly Used Defense Sites" ("FUDS"). Cleanups undertaken under the DERP statute are to be carried out "subject to, and in a manner consistent with, section 120 (relating to Federal facilities)" of CERCLA. 10 U.S.C. § 2701(a)(2). Responsibility for DERP/FUDS program execution

(Continued on following page)

A suit is a "challenge" to a removal or remedial action if it relates to the goals of the cleanup. *New Mexico v. General Electric Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006); *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995). Plaintiffs' suit constitutes a "challenge" to the Corps' activities at the Yellow Jacket FUDS site response process, because the relief Plaintiffs seek would have an impact on the FUDS process there.

The reach of section 113(h) is intended to be broad. Because the activities of the Corps at the Yellow Jacket FUDS site are undisputed and qualify as a removal action selected under CERCLA section 104, and because Plaintiffs' suit constitutes a challenge to the ongoing removal activities being undertaken by the Corps, each of Plaintiffs' three claims for relief must be dismissed without prejudice pursuant to 42 U.S.C. § 9613(f).

---

has been delegated by the Secretary of Defense to the United States Army and by the Secretary of the Army to the Corps.

Done this 4 day of April, 2007.

BY THE COURT:

/s/ Dee Benson
Hon. Dee Benson
United States District Judge

APPROVED
AS TO FORM:

ATTORNEYS
FOR PLAINTIFFS:

MOUNTAIN STATES
LEGAL FOUNDATION

Dated: April 4, 2007 /s/ Joshua D. McMahon
JOSHUA D. McMAHON
WILLIAM PERRY PENDLEY
2596 South Lewis Way
Lakewood, Colorado 80227

PARSON BEHLE & LATIMER
HAL J. POS,
Utah Bar No. 5310
MICHAEL J. MALMQUIST,
Utah Bar No. 5310
One Utah Center
201 South Main Street,
Suite 1800
Salt Lake City, Utah 84111

ATTORNEYS
FOR DEFENDANTS:

MATTHEW J. McKEOWN
Acting Assistant Attorney
General
Environment and
Natural Resources Division

Dated: April 4, 2007 By: /s/ Daniel Pinkston

DANIEL PINKSTON
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
1961 Stout Street, 8th Floor
Denver, Colorado 80294

BRETT L. TOLLMAN,
Utah Bar No. 8821
United States Attorney
DANIEL D. PRICE,
Utah Bar No. 2646
Assistant United States Attorney
185 South State Street, Suite 400
Salt Lake City, Utah 84111

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

CHAPTER 103 – COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

SUBCHAPTER I – HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

Sec. 9601. Definitions

For purpose of this subchapter –

* * *

(23) The terms "remove" or "removal" means[3] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section

---

[3] So in original. Probably should be "mean".

9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].

(24) The terms "remedy" or "remedial action" means[3] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures,

---

[3] So in original. Probably should be "mean".

such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

* * *

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

CHAPTER 103 – COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

SUBCHAPTER I – HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

Sec. 9604. Response authorities

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by

any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

* * *

TITLE 42 – THE PUBLIC HEALTH AND WELFARE

CHAPTER 103 – COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY

SUBCHAPTER I – HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

Sec. 9613. Civil proceedings

* * *

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

* * *

DEPARTMENT OF THE ARMY ER 200-3-1
U.S. Army Corps of Engineers
CEMP-D **Washington, D.C. 20314**

Regulation
No. 200-3-1

10 May 2004

Environmental Quality
FORMERLY USED DEFENSE SITES (FUDS) PROGRAM POLICY

* * *

4.5 Removal Response Process. The NCP does not require that a removal PA/SI be performed when a remedial PA/SI has already been completed. Language in 40 CFR 300.410 states that removal site evaluation shall be undertaken, as appropriate, by the lead agency and that the removal SI *may* be performed if more information is required than was provided by the PA. Therefore, if during the course of investigations the determination is made that a removal action is required, the remedial site evaluation already performed will be considered adequate to meet the requirements of a removal site evaluation.

4-5.1 *Removal Actions – General.* Removal actions generally have limited objectives, and typically are short-term actions to mitigate the threat posed by a release or threatened release of hazardous substances or pollutants or contaminants (including MEC and MC). The removal action process cannot attain the RIP or RC milestones and cannot be used to make closeout decisions. All closeout decisions must occur in the remedial process. The decision to

perform a removal response to address HTRW and military munitions and their constituents will be based on project specific conditions and consideration of the NCP factors listed in paragraph 4-4.2. Long range planning and programming for removal responses is inconsistent with the application of project specific conditions and consideration of the NCP factors. Therefore, the planning and programming with FUDSMIS to initiate removal responses for HTRW or MMRP projects can only be performed during the current and budget years. Examples of the types of actions that may be taken under removal authority include:

- Installing fences, warning signs, or other security or site control precautions where humans or animals have access to the release.

- Installing drainage controls, for example, run-off or run-on diversions, where needed to reduce migration of hazardous substances or pollutants or contaminants off-site or to prevent precipitation or run-off from other sources, for example, flooding, from entering the release area from other areas;

- Stabilization of berms, dikes, or impoundments or drainage or closing of lagoons, where needed to maintain the integrity of the structures;

- Capping of contaminated soils or sludges, where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground or surface water, or air;

• Using chemicals and other materials to retard the spread of the release or to mitigate its effects – where the use of such chemicals will reduce the spread of the release;

• Excavation, consolidation, or removal of highly contaminated soils from drainage or other areas – where such actions will reduce the spread of, or direct contact with, the contamination;

• Removal of MEC, drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants, where doing so will reduce the likelihood of spillage; leakage; exposure to humans, animals, or food chain; or fire or explosion;

• Containment, treatment, disposal, or incineration of hazardous materials, where needed to reduce the likelihood of human, animal, or food chain exposure; or

• Provision of alternative water supply, where necessary immediately to reduce exposure to contaminated household water and continuing until such time as local authorities can satisfy the need for a permanent remedy.

4-5.2 *Categories of Removal Actions.* EPA categorizes removal actions in three ways: emergency, time-critical, and non-time-critical based upon the situation, the urgency and threat of release or potential release, and the subsequent time frame in which the action must be initiated. Each type of

removal action is discussed in detail below. When appropriate, removal actions can be conducted as part of any HTRW or MMRP project and should lower risks and may reduce total project cost. Removals are normally expedited response actions, as opposed to final remedial actions that are usually intended to provide permanent remedies. However, some removal actions may result in the cleanup of all hazardous substances, pollutants, or contaminants at a FUDS. Following any removal action (emergency, time-critical, non-time critical), the effort shall transition to the remedial action process to determine what additional response action is necessary to achieve the RIP or RC milestones, or project or property closeout. Figure 4-4 shows the typical removal process for HTRW and MMRP projects.

4-5.2.1 *Emergency Removal Actions.* Emergency removal actions address immediate, unacceptable hazards or risks and must commence within hours of discovery. Due to the exigency of an emergency removal, an Action Memorandum is not required prior to performing the emergency removal. However, an Action Memorandum will be completed following the emergency removal action to document the response and to meet the requirements for the Administrative Record. Action Memorandum and Administrative Record requirements are discussed later in this chapter.

4-5.2.1.1 *Explosives of Munitions Emergency Response.* Military EOD units or local law enforcement officials, not the USACE, execute explosives or

munitions emergency response actions. USACE will perform follow-on response actions as appropriate in accordance with CERCLA and the NCP. USACE Districts, on being notified of the potential need for an explosives or munitions emergency response should contact the MM CX for assistance in obtaining EOD support. While USACE does not perform explosives or munitions emergency responses, information about such actions should be included as part of the data collected in the preliminary assessment, site inspection, or remedial investigation phases. This information should be available from the installations or local law enforcement agencies where the explosive ordnance disposal team is located.

[Figure 4-4 Omitted In Printing]

4-5.2.1.2 *CERCLA Emergency Removal Actions.* HTRW and MC emergency removal actions would be conducted by USACE at HTRW and MMRP projects where the release of CERCLA hazardous substances, pollutants, or contaminants pose an immediate risk to human health, safety, or the environment. For the most part, these types of immediate threats are not found at sites where DoD activity occurred well in the past. Where the need for an emergency removal action is deemed appropriate, the requirements are found in the NCP at 40 CFR 300.415.

4-5.2.1.3 *Transition from Emergency Removal Actions to the Remedial Process.* If subsequent removal activities are not required upon completion of

an emergency removal action, activities at the project will continue under the remedial action process.

4-5.2.2 *Time-Critical Removal Actions (TCRA).* The general difference between a TCRA and a Non-Time-Critical Removal Actions (NTCRA) is the amount of planning time that exists before on-site activities must be initiated. A TCRA is a removal action for which less than six months of planning time is available before on-site activities must begin. TCRAs may be conducted for both HTRW and MMRP projects according to the guidance provided below. ARARs must be attained in executing the removal action only to the extent practicable based upon the exigency of the situation and the scope of the removal action to be taken. However, once work at the project transitions back to the remedial process, ARARs must be either met or formally waived (i.e., non-compliance with ARAR that extends past the completion of the removal action must be addressed in the remedial decision). Additional guidance on compliance with ARARs during TCRAs can be found in paragraph 4-9.1. TCRAs can be performed at any stage of the CERCLA response process. A TCRA is programmed as an Interim Removal Action (IRA) in FUDSMIS.

4-5.2.2.1 *TCRA Process.* The typical flow of events for a TCRA is shown in Figure 4-4. The three key items are providing the lead regulator notice and opportunity for comment on proposed actions, the Action Memorandum, and the availability of the

Administrative Record file. Coordination with regulators shall be performed in accordance with Chapter 9.

4-5.2.2.2 *Administrative Record File.* Because of the immediate nature of a TCRA, the regulations do not require that the Administrative Record file be available before the implementation of the action. However, the Administrative Record file must be available to the public for review and comments within 60 days of the start of the fieldwork. Additional information on Administrative Record requirements is provided later in this Chapter.

4-5.2.2.3 *Action Memorandum.* An Action Memorandum is required before conducting a TCRA. The Action Memorandum must include the information listed in the Action Memorandum outline found in Appendix C. While lead regulator signature is not required on Action Memorandum, concurrence shall be actively sought and efforts made to identify and resolve outstanding regulator issues and comments. The Action Memorandum will describe the State regulatory agency's position, including whether or not that agency supports the action. For MEC removal Action Memoranda, coordination with the MM CX is required prior to signature.

4-5.2.2.4 *TCRA Action Memoranda Signature Authority.* Refer to Appendix C for the signature requirements for TCRA Action Memoranda.

4-5.2.2.5 *Transition from TCRAs to the Remedial Process.* If subsequent removal activities are not required upon completion of a TCRA, activities at the

project will continue under the remedial action process. A TCRA cannot achieve the RIP or RC milestones or site closeout.

4-5.2.3 *Non-Time-Critical Removal Actions (NTCRA).* Whenever a planning period of at least six months exists before on-site activities must be initiated, and it has been determined, based upon the Remedial Site Evaluation that a removal action is appropriate, an Engineering Evaluation and Cost Analysis (EE/CA) shall be conducted. Additional guidance for NTCRAs is available in EPA 540-R-93-057. Removal actions done for MEC should also follow guidance in EP 1110-1-18. ARARs must be complied with to the extent practicable based upon the exigency of the situation and the scope of the removal action to be taken. Additional guidance on compliance with ARARs during a NTCRA can be found in paragraph 4-9.1. The typical process for NTCRAs is show in Figure 4-4. The NCP requires that the Administrative Record file be established when the EE/CA is made available to the public. Additional information on Administrative Records is provided in Chapter 8. Once comments on the EE/CA have been received, considered in the selection of the removal alternative, and responses documented, an Approval Memorandum will be prepared. Additional guidance on processes and procedures for conducting MMRP NTCRAs can be found in EP 1110-1-18.

4-5.2.3.1 *Engineering Evaluation and Cost Analysis (EE/CA) Approval Memorandum.* While not required by the NCP for FUDS projects, an EE/CA

Approval Memorandum is required by FUDS policy to document the rationale to conduct a removal action and is prepared once the need for a NTCRA has been determined. The EE/CA Approval Memorandum is not a part of the EE/CA, but is part of the Administrative Record file for the project.

- *EE/CA Approval Memorandum Functions.* The EE/CA Approval Memorandum serves three functions:

  - Secures management approval to conduct the EE/CA.

  - Documents that a NTCRA is appropriate given the conditions at the site and the hazard posed to human health, safety and the environment and that a planning period of at least six months is available before on-site activities must begin.

  - Provides detailed information pertaining to the site background; threats to public health, safety, or the environment posed by the site; and projected costs.

- *EE/CA Approval Memorandum Format.* The EE/CA Approval Memorandum will be prepared in accordance with the format shown in Table 4-2 to provide the rationale and justification to perform a removal action. Section 3 of the memorandum will include an analysis of the removal factors to determine if a removal action is appropriate.

• *EE/CA Approval Memorandum Development and Signature Authority.* The PM District will prepare the EE/CA Approval Memorandum in coordination with the HTRW Design District or the MM Design Center, as appropriate. The preliminary identification of exposures or explosives safety hazards will be based on information obtained from the PA or SI, other investigations that may have been conducted, and the CSM. Upon approval of the EE/CA Approval Memorandum by the District Commander, appropriate removal actions may be undertaken to abate, prevent, minimize, mitigate, or eliminate explosives hazards, releases, or threat of release.

* * *

121

(3)

No. 08-683

In the Supreme Court of the United States

F. DOUGLAS CANNON, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
STACEY W. PERSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' suit was barred by 42 U.S.C. 9613(h), a provision that is contained in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, and that generally precludes federal courts from adjudicating challenges to removal or remediation actions under CERCLA.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

APWU v. *Potter*, 343 F.3d 619 (2d Cir. 2003) 9, 10
Boarhead Corp. v. *Erickson*, 923 F.2d 1011 (3d Cir. 1991) 9, 11
Broward Gardens Tenants Ass'n v. *EPA*, 311 F.3d 1066 (11th Cir. 2002) 11
Cannon v. *United States*, 338 F.3d 1183 (10th Cir. 2003) 3, 4
Costner v. *URS Consultants, Inc.*, 153 F.3d 667 (8th Cir. 1998) 11
Frey v. *EPA*, 403 F.3d 828 (7th Cir. 2005) 12, 13
Hanford Downwinders Coal., Inc. v. *Dowdle*, 71 F.3d 1469 (9th Cir. 1995), aff'd, 76 F.3d 385 (9th Cir. 1996) 10, 12
Kokkonen v. *Guardians Life Ins. Co. of Am.*, 511 U.S. 375 (1994) 14
McClellan Ecological Seepage Situation v. *Perry*, 47 F.3d 325 (9th Cir.), cert. denied, 516 U.S. 807 (1995) 8, 9
New Mexico v. *General Elec. Co.*, 467 F.3d 1223 (10th Cir. 2006) 6, 11, 12

Cases—Continued: Page

Razore v. *Tulalip Tribes*, 66 F.3d 236 (9th Cir. 1995) 7, 10, 11
Schalk v. *Reilly*, 900 F.2d 1091 (7th Cir.), cert. denied, 498 U.S. 981 (1990) 12, 13
United States v. *City of Denver*, 100 F.3d 1509 (10th Cir. 1996) 15
West Va. Univ. Hosps., Inc. v. *Casey*, 499 U.S. 83 (1991) 14

Statutes and regulations:

Act of Oct. 17, 1986, Pub. L. No. 99-499, 100 Stat. 1725 (10 U.S.C. 2700 *et seq.*) 2
10 U.S.C. 2701(a)(2) 3
10 U.S.C. 2701(c)(1) 3
10 U.S.C. 2701(c)(1)(B) 2
10 U.S.C. 2703(a)(5) 3
10 U.S.C. 2703(c)(1) 3
10 U.S.C. 2710(a)(1) 2
10 U.S.C. 2710(b)(1) 2
10 U.S.C. 2710(b)(2) 15
10 U.S.C. 2710(b)(2)(A)-(H) 15
Administrative Procedure Act, 5 U.S.C. 706 4
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 1
42 U.S.C. 9601(23) 6, 9
42 U.S.C. 9604 ..... 5, 6, 9
42 U.S.C. 9604(a) 5, 6
42 U.S.C. 9604(a)(1) 2, 9

Statutes and regulations—Continued: Page

42 U.S.C. 9604(b) 6
42 U.S.C. 9604(b)(1) 6, 9
42 U.S.C. 9613(h) 3, 5, 8, 13, 14, 15
42 U.S.C. 9615 2
Federal Tort Claims Act:
28 U.S.C. 1346(b) 4
28 U.S.C. 2761-2680 4
Solid Waste Disposal Act, 41 U.S.C. 6901 *et seq.* 4
40 C.F.R.:
Pt. 300 ..... 2, 12
Section 300.5 2
Section 300.415 7
Section 300.415(b)(4) 7
Section 300.415(b)(4)(i) 7
Exec. Order No. 12,580, 3 C.F.R. 194 (1987) 2

In the Supreme Court of the United States

No. 08-683

F. DOUGLAS CANNON, ET AL., PETITIONERS

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 538 F.3d 1328. The opinion of the district court (Pet. App. 19-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2008. The petition for a writ of certiorari was filed on November 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the President to initiate removal or remedial actions, consistent with the Na-

tional Contingency Plan, 40 C.F.R. Pt. 300, whenever there is a release of hazardous substances. 42 U.S.C. 9604(a)(1). In situations where the release of a hazardous substance is from a facility under the jurisdiction, custody, or control of the Department of Defense (DoD), the President has delegated his CERCLA authority to the Secretary of Defense (Secretary). See 42 U.S.C. 9615 (authorizing the President "to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter"); Exec. Order No. 12,580, § 1(d), 3 C.F.R. 194 (1987); 40 C.F.R. 300.5 (definition of "lead agency").

In addition to his CERCLA authority, the Secretary has authority pursuant to the Act of Oct. 17, 1986 (DERP), Pub. L. No. 99-499, 100 Stat. 1725 (10 U.S.C. 2700 *et seq.*), to carry out all response actions with regard to releases of hazardous substances from any facility or site currently under the jurisdiction of DoD, as well as any "facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances." 10 U.S.C. 2701(c)(1)(B). The latter type of properties are known as Formerly Used Defense Sites (FUDS). DERP requires the Secretary to develop an inventory of all defense sites that "are known or suspected to contain unexploded ordinance, discarded military munitions, or munitions constituents." 10 U.S.C. 2710(a)(1). The Secretary must assign to each such defense site a "relative priority for response activities * * * based on the overall conditions at the defense site." 10 U.S.C. 2710(b)(1).

All DERP response actions must be carried out in accordance with the provisions of CERCLA. 10 U.S.C. 2701(a)(2) and (c)(1). Thus, FUDS cleanup actions are conducted under the relevant provisions of both CERCLA and DERP, utilizing DERP appropriations. See 10 U.S.C. 2703(a)(5) (establishing the "Environmental Restoration Account, Formerly Used Defense Sites"); 10 U.S.C. 2703(c)(1) (stating that the purpose of the DERP accounts is for the environmental restoration functions of the Secretary under DERP).

b. The statutory provision most directly at issue in this case is 42 U.S.C. 9613(h), which is contained in CERCLA and addresses the timing of judicial review of removal and remedial actions. Section 9613(h) provides, subject to certain exceptions that are not implicated in this case, that "[n]o federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship * * *) * * * to review any challenges to removal or remediation action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title." *Ibid.*

2. In 1945, the United States Army leased 1416 acres in Tooele County, Utah (the property), from Jesse Fox Cannon, petitioners' grandfather, for a six-month period. The property was adjacent to the Army's Dugway Proving Grounds. During the lease period, the Army used the property to test various methods "of battling Japanese forces entrenched in caves in the Pacific Islands." *Cannon* v. *United States*, 338 F.3d 1183, 1184 (10th Cir. 2003). As part of that testing, the Army used incendiary devices and chemical weapons, and it dropped conventional bombs on the property as well. Pet. App. 3-4.

After the Army ceased operations on the property, petitioners' grandfather filed three administrative claims with the government regarding the condition in which the property had been left. The first two claims (filed in September and October 1945, respectively), were granted. In 1950, Jesse Fox Cannon filed a third administrative claim, which was denied. Pet. App. 4.

In 1998, two of Jesse Fox Cannon's grandchildren (petitioners Margaret Louise Cannon and Allan Robert Cannon), who together then owned 75% of the property, filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680. In 2003, the court of appeals reversed a judgment in favor of the plaintiffs and ordered the district court to dismiss the suit because the statute of limitations barred their claims. Pet. App. 5 (citing *Cannon*, 338 F.3d at 1184, 1189-1194).

3. a. In November 2005, petitioners filed suit against the United States, DoD, the Department of the Army, and the Secretary (collectively, the United States) under the citizen-suit provisions of the Solid Waste Disposal Act (SWDA), 41 U.S.C. 6901 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. 706. Pet. App. 5-7. Petitioners sought a declaratory judgment that the United States had contaminated the property, violated various federal and state regulations, and unlawfully withheld and unreasonably delayed cleanup of the property. Petitioners also requested injunctive relief "including, but not limited to, an order for remediation of the solid and hazardous wastes disposed of on the Property by [the United States], as necessary to address the imminent and substantial endangerment to human health and the environment * * * and to restore the property to a safe and useful condition." *Id.* at 22.

b. Relying on Section 9613(h), the district court dismissed petitioners' suit for lack of subject-matter jurisdiction. Pet. App. 19-28. The court stated that it was "undisputed that the [Army Corps of Engineers (Corps)] had undertaken efforts to begin the site inspection process at" petitioners' property, "including having obligated funds for a contract for the work, providing a draft site inspection workplan to [petitioners] and the Utah Department of Environmental Quality ('UDEQ'), and soliciting rights-of-entry for properties involved in the investigation." *Id.* at 24.[1] The court concluded that "[t]hese actions fall within the statutory definition of 'removal,'" and "are also authorized pursuant to" 42 U.S.C. 9604(a). Pet. App. 24. The district court held that, for purposes of Section 9613(h)'s jurisdictional bar, "the activities undertaken and to be undertaken by the Corps" therefore "constitute a 'removal or remedial action selected under'" 42 U.S.C. 9604. See Pet. App. 24. The district court further determined that petitioners' suit was a "challenge" to that removal or remediation action "because the relief [petitioners] seek would have an impact on the FUDS process there." *Id.* at. 26.[2]

4. The court of appeals affirmed. Pet. App. 1-18. The court explained that Section 9613(h) "protects the execution of a CERCLA plan *during its pendency* from

---

[1] The Secretary of Defense has delegated responsibility for the DERP/FUDS program to the United States Army, and the Secretary of the Army has delegated responsibility to the Corps. Pet. App. 25 n.4.

[2] The district court also observed that "[n]o party ha[d] suggested that any of the five exceptions to the withdrawal of jurisdiction" contained in Section 9613(h) was applicable here, and it concluded that none of those exceptions applied. Pet. App. 24-25; see *id.* at 9-10 (court of appeals stating that "[t]he parties concede that none of § 9613(h)'s exceptions apply").

lawsuits that might interfere with the expeditious clean-up effort," but "does not preclude actions to challenge a remedial plan *after* that plan has been completed." *Id.* at 8-9 (quoting *New Mexico* v. *General Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006)).

The court of appeals first concluded "that the Government had selected a removal action [with respect to petitioners' property] pursuant to its authority under [42 U.S.C. 9604]." Pet. App. 16; see *id.* at 10-17. The court explained that "the Government's authority to begin removal actions depends on 42 U.S.C. § 9604," and that Section 9604(a) "authorizes the President to take removal or other remedial action which the President 'deems necessary to protect the public health or welfare or the environment.'" *Id.* at 11 (quoting 42 U.S.C. 9604(a)). As the court further observed (*id.* at 11-12), Section 9604(b) in turn provides that "[w]henever the President is authorized to act pursuant to subsection (a)," he may undertake appropriate preparatory steps, including "investigations, monitoring, surveys, testing and other information gathering as he may deem necessary or appropriate to identify the existence and extent of" threats to public health or the environment, as well as "studies or investigations as he may deem necessary to plan and direct response actions." 42 U.S.C. 9604(b)(1); see 42 U.S.C. 9601(23) (defining the term "removal" as including "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances").

Based on that statutory language, the court of appeals determined "that a removal action is ongoing and * * * § 9613's jurisdiction strip applies, even if the Government has only begun to 'monitor, assess, and evaluate the release or threat of release of hazardous sub-

stances.'" Pet. App. 13 (quoting *Razore* v. *Tulalip Tribes*, 66 F.3d 236, 239 (9th 1995)). The court also concluded that, under that standard, "the Government's removal actions [in this case] are * * * sufficient to trigger § 9613(h)." *Id.* at 14. The court observed that "the Government has completed a preliminary assessment of [petitioners'] property," which included "compil[ing] historical records, interviews, and site surveys to determine the exact nature of the military testing conducted on [petitioners'] property" and preparing a draft report that "indicated that [petitioners'] property was in fact highly contaminated." *Ibid.*; see 40 C.F.R. 300.415(b)(4) and (4)(i) (providing that such a report must be prepared "[w]henever a planning period of at least six months exists before on-site activities must be initiated" and that it consists of "an analysis of removal alternatives for a site"). The court further noted that "the record * * * indicates that the Government was planning its site inspection while this suit was pending before the district court." Pet. App. 14.[3]

The court of appeals rejected petitioners' claim "that the Government has not selected a removal action until it has complied with the full panoply of the applicable regulations," that is, until the government has "conduct[ed] a site inspection, issue[d] an engineering evaluation and cost assessment report, take[n] public comments, and finally ma[d]e a decision about the removal action based on the administrative record." Pet. App. 15 (citing 40 C.F.R. 300.415). The court stated that "[n]othing in the statutory language suggests that Congress intended th[e] jurisdiction-stripping provision to apply

[3] The court of appeals denied the United States' request to take judicial notice of the final site inspection plan, explaining that the document was "not necessary for the resolution of this appeal." Pet. App. 14 n.6.

only once the Government has completed a substantial portion of its removal proceeding." *Id.* at 15-16. The court of appeals also held that petitioners' suit constitutes a "challenge," within the meaning of Section 9613(h), to the ongoing removal process. *Id.* at 17. The court explained that a grant of injunctive relief ordering the remediation of petitioners' property "would undoubtedly interfere with the Government's ongoing removal efforts." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the jurisdiction-stripping provision contained at 42 U.S.C. 9613(h) bars petitioners' suit. Petitioners' claims are based on the SWDA and the APA and therefore arise "under Federal law." *Ibid.* Petitioners do not contend that any of the exceptions listed in Section 9613(h)(1)-(5) is applicable here. See Pet. App. 9-10, 24-25. The only question, therefore, is whether this citizen suit, though not brought under CERCLA itself, nonetheless constitutes a "challenge[] to removal or remedial action selected under section 9604 of" Title 42. 42 U.S.C. 9613(h). As the court of appeals correctly determined, petitioners' suit is such a challenge and is therefore barred by Section 9613(h).[4]

---

[4] Other courts of appeals have likewise held that Section 9613(h) bars challenges to ongoing removal or remedial action conducted under Section 9604 even when those challenges are brought under statutes other than CERCLA. See, *e.g.*, *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 331 (9th Cir.) ("The district court correctly determined that CERCLA Section 113(h) withholds federal jurisdiction to review citizen suits and actions brought under other, non-CERCLA

a. Contrary to petitioners' contention (Pet. 16-17), the Corps' activities constitute a "removal * * * action" within the meaning of 42 U.S.C. 9604. Section 9604(a)(1) authorizes the President to take removal or remediation actions that he deems "necessary to protect the public health or welfare or the environment." 42 U.S.C. 9604(a)(1). Section 9604(b), in turn, provides that "[w]henever the President is authorized to act pursuant to subsection (a)," the response may include "such *investigations*, monitoring, surveys, testing, *and other information gathering* as [the President] may deem necessary or appropriate to identify the existence and extent of the release or threat thereof," the nature of the hazardous substances involved, and the extent of the danger to the public health or the environment. 42 U.S.C. 9604(b)(1) (emphases added). The fact that those preliminary steps are themselves part of a "removal * * * action" is confirmed by 42 U.S.C. 9601(23), which defines the terms "remove" and "removal" to include "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances," as well as any "action taken under section 9604(b)." Accord *APWU* v. *Potter*, 343 F.3d 619, 624 (2d Cir. 2003) ("'Removal actions' are defined broadly to include not only the cleanup and removal [of hazardous substances], but also the undertaking of studies, investigations, testing and other information gathering activities.").

---

statutes that challenge ongoing CERCLA cleanup actions."), cert. denied, 516 U.S. 807 (1995); *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1024 (3d Cir. 1991) (stating that, when it applies, Section 9613(h) "deprives [a federal court of jurisdiction] to hear claims under * * * any * * * statute[] that would interfere with EPA's clean-up actitivities on a Superfund site").

As the court of appeals correctly recognized, the "statutory definition of a removal action dictates that a removal action is ongoing," and that Section 9613(h)'s jurisdictional bar applies, "even if the Government has only begun to monitor, assess, and evaluate the release or threat of release of hazardous substances." Pet. App. 13 (internal quotation marks and citation omitted). Other courts have agreed that the existence of ongoing investigative activities is sufficient to trigger Section 9613(h). See, *e.g.*, *Hanford Downwinders Coal., Inc.* v. *Dowdle*, 71 F.3d 1469, 1477 (1995) (health assessment and surveillance activities constitute removal action), aff'd, 76 F.3d 385 (9th Cir. 1996); *Razore* v. *Tulalip Tribes*, 66 F.3d 236, 239 (9th Cir. 1995) (preliminary investigations under CERCLA's remedial investigation process); *APWU*, 343 F.3d at 624 (testing and investigation of possible anthrax contamination).

Under that standard, the Corps' activities with respect to petitioners' property constitute a removal action. The Corps has completed a preliminary assessment of the property, which involved an investigation to determine precisely what activities were conducted there during the final year of World War II. Pet. App. 14. At the time of the district court's decision, moreover, the Corps had set aside appropriated funds for the purpose of conducting a site survey, had provided a draft site inspection workplan to petitioners and the appropriate state authorities, and had begun soliciting rights-of-entry from owners of impacted properties. *Id.* at 24.

b. Petitioners contend (Pet. 19-20) that the Corps has not yet "selected" a removal action, and that Section 9613(h) therefore is inapplicable here, because the agency has not yet completed the full extent of the regu-

latory procedures, including a public comment period and the making of a final decision about how to complete the removal action. That argument, however, "unduly restricts the plain language of § 9613(h)." Pet. App. 15. As explained above, "a removal action is [an] ongoing" undertaking that begins as soon as the government "beg[ins] to 'monitor, assess, and evaluate the release or threat of release of hazardous substances.'" *Id.* at 13 (quoting *Razore*, 66 F.3d at 239). "Nothing in the statutory language suggests that Congress intended [Section 9613(h)] to apply only once the Government has completed a substantial portion of" an ongoing removal proceeding. *Id.* at 15-16; accord *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1023 (3d Cir. 1991) (holding that Section 9613(h)'s jurisdictional bar applied where the EPA had communicated an intent to begin preliminary studies that might or might not lead to other CERCLA response activities); *Razore*, 66 F.3d at 239 (holding that Section 9613(h) barred the plaintiff's claims where investigations were ongoing under a Remedial Investigation and Feasibility Study, which is an interim step in a removal action).

c. The court of appeals also correctly rejected petitioners' contention (Pet. 14-16) that this suit does not constitute a "challenge" to a removal action. As the court of appeals explained, a suit constitutes such a "challenge" if it would "interfere with the Government's ongoing removal efforts," Pet. App. 17, or "relate[] to the goals of the cleanup," *New Mexico* v. *General Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006); accord *Broward Gardens Tenants Ass'n* v. *EPA*, 311 F.3d 1066, 1072-1073 (11th Cir. 2002); *Costner* v. *URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998); *Razore*, 66 F.3d at 239.

Petitioners asked the district court to enter an injunction "order[ing] [the] remediation of" their property "as necessary to address the imminent and substantial endangerment to human health and the environment that currently exists and to restore the property to a safe and useful condition." Pet. App. 22. That form of relief would clearly "relate to the goals of the cleanup" and risk "substitut[ing] a federal court's judgment for the authorized judgment of" the Corps about what steps are necessary and appropriate with respect to petitioners' property. *General Elec. Co.*, 467 at 1249; see *Hanford Downwinders Coal.*, 71 F.3d at 1482 (holding that requests for injunctive relief qualify as challenges to CERCLA response activity). The Corps' current investigations and studies are a necessary step in any removal or remedial action, see 40 C.F.R. Pt. 300, and those activities will enable the agency to make informed decisions regarding any additional action required to clean up the property. Because "challenges to the procedure employed in selecting a remedy * * * impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute[,] the statute necessarily bars these challenges." *Schalk* v. *Reilly*, 900 F.2d 1091, 1097 (7th Cir.), cert. denied, 498 U.S. 981 (1990).

2. Contrary to petitioners contention (Pet. 21-24), the court of appeals' decision in this case does not conflict with the Seventh Circuit's decision in *Frey* v. *EPA*, 403 F.3d 828 (2005). In *Frey*, the EPA had completed the process of formally selecting a particular method for remediating the property in question, and it had completed the implementation of its chosen approach more than five years before the date of the court of appeals' decision. See *id.* at 831-832. The Seventh Circuit there-

fore framed the issue before it as "whether the record shows that only a stage [of a remedial action] has been completed, or if it shows that an entire remedial measure has been complete." *Id.* at 834. The *Frey* court determined that, on the facts before it, the remedial action had been completed for purposes of Section 9613(h)'s jurisdictional bar because the EPA had finished its excavation and there was "no evidence of any kind that EPA will be doing anything specific in the future with this site." *Id.* at 835.

This case differs from *Frey* in two material respects. First, unlike the plaintiffs in *Frey*, petitioners do not contend that the Corps has *completed* a removal or remediation action with respect to their property. Because the court of appeals in this case recognized that "Section 9613(h) * * * does not preclude actions to challenge a remedial plan *after* that plan has been completed," Pet. App. 9, its decision does not suggest that Section 9613(h) would bar a suit under the circumstances that the Seventh Circuit found to exist in *Frey*. Accord *Schalk*, 900 F.2d at 1095-1095 (relying on Section 9613(h) to affirm dismissal of a suit involving the same property at issue in *Frey* where remedial action had not yet been completed). Second, whereas the Seventh Circuit in *Frey* understood the government to be arguing that the Section 9613(h) bar applies "as long as [EPA] has any notion that it might, some day, take further unspecified action with respect to a particular site," here the Corps has taken a number of concrete steps that together provide "objective indicator[s]" of an ongoing process. *Frey*, 403 F.3d at 834-835. As the courts below explained, at the time this case was pending in the district court, funds had been allocated for the work, and the Corps had conducted a preliminary assessment of

the property and had issued a draft site inspection work plan. Pet. App. 14, 24. Those activities clearly constitute removal actions as that term is defined in CERCLA. See pp. 9-10, *supra*.

The court of appeals stated without explanation that its decision "splits with the Seventh Circuit's holding in *Frey*." Pet. App. 16 n.7. For the reasons stated above, however, the different outcomes here and in *Frey* are attributable to factual differences between the two cases. Petitioners read *Frey* to hold that Section 9613(h) does not apply during the investigative phase of a remedial action unless the government has identified some objective basis for concluding that its remedial activities will proceed at a reasonable pace. See Pet. 22. Even if that reading is accurate, the factbound question whether the government is proceeding with reasonable dispatch in this case would not warrant this Court's review.

3. Petitioners contend (Pet. 25-28) that the court of appeals' decision in this case does not further the overriding "purpose of the bar on preenforcement review." Pet. 25. They argue that the circumstances of this case "cry[] out for a federal court to assert jurisdiction," Pet. 26, even if it means crafting a judicially created "exception" to "[t]he bar on preenforcement review codified in" Section 9613(h), Pet. 28. That contention lacks merit.

"Federal courts are courts of limited jurisdiction," and they "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen* v. *Guardians Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citation omitted). In addition, "[t]he best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Va. Univ.*

Hosps., Inc. v. *Casey*, 499 U.S. 83, 98 (1991). A federal court may not adjudicate a case over which Congress has divested it of jurisdiction, even if the court concludes that the purposes of the relevant jurisdictional bar are not implicated in the particular circumstances before it.

In any event, this suit squarely implicates the considerations that prompted Section 9613(h)'s enactment. In enacting Section 9613(h), "Congress intended to prevent time-consuming litigation which might interfere with CERCLA's overall goal of effecting the prompt cleanup of hazardous waste sites." *United States* v. *City of Denver*, 100 F.3d 1509, 1514 (10th Cir. 1996) (citation omitted). Allowing petitioners' suit to proceed would disserve that congressional intent by threatening to disrupt, and thus slow down, cleanup of formerly used defense sites on a national basis.

In addition, DERP instructs the Secretary of Defense to "assign[] the response priority for a" given site based "primarily [on] factors relating to health and safety," 10 U.S.C. 2710(b)(2), and it directs the Secretary to consider eight specified criteria in making those determinations, 10 U.S.C. 2710(b)(2)(A)-(H). Petitioners' suit threatens to distort that evidence-based process for determining how to expend the finite resources available for cleanup operations. If petitioners' attempt to obtain a judicial decree ordering the immediate cleanup of their property were to succeed, it would encourage any property owner who was dissatisfied with the pace of the Corps' actitivities or his place in the line to file suit in the hopes of being moved to the front.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General

JOHN C. CRUDEN
Acting Assistant Attorney General

STACEY W. PERSON
Attorney

FEBRUARY 2009

2

(3)

No. 08-683

FILED
MAR 9, 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

F. DOUGLAS CANNON, MARGARET LOUISE CANNON, and ALLAN ROBERT CANNON,

Petitioners,

v.

ROBERT M. GATES, Secretary, United States Department of Defense; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE ARMY; UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONERS

RONALD W. OPSAHL
Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

HAL J. POS
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 532-1234

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Frey v. Envtl. Prot. Agency, 403 F.3d 828 (7th Cir. 2005) ..... *passim*

New Mexico v. Gen. Elec. Co., 467 F.3d 1223 (10th Cir. 2006) 5

STATUTES

42 U.S.C. § 9604 3

42 U.S.C. § 9613(h) 1, 2, 3, 4, 6

REPLY BRIEF FOR PETITIONERS

The central issue in this case is whether the timing-of-review provision of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9613(h), bars a suit to compel a federal cleanup of private property that the federal government contaminated where the federal government simply points to intermittent "ongoing" investigations that have no objective goals or timelines, or whether the federal government must point to an objective referent that commits it and other responsible parties to an action or plan before it may invoke the provision. In this case, the Tenth Circuit held that so long as the federal government declares that it will conduct some investigation, even when it specifies no date certain, CERCLA bars judicial review. App. 14. The Seventh Circuit has held, however, that the federal government may not invoke CERCLA's timing-of-review provision based only upon vague assertions that future federal actions will occur. *Frey v. Envtl. Prot. Agency*, 403 F.3d 828, 834 (7th Cir. 2005) ("There is no support in the statute for such an open-ended prohibition on a citizen suit."). Instead, the Seventh Circuit required the federal government to provide an objective point of reference that commits it to a future action. *Id.* ("For EPA to delay Frey's suit, it must point to some objective referent that commits it and other responsible parties to an action or plan."). Without such a commitment, the Seventh Circuit held, the federal government

may not invoke CERCLA's timing-of-review provision. *Id.*

Here, Respondents continue to point to their history of on-again, off-again "studies" in an attempt to persuade this Court that a CERCLA cleanup is "ongoing" on the Cannons' property. Respondents' Brief in Opposition at 9-14. Conspicuously absent from Respondents' Brief in Opposition, however, is a timeline of this "ongoing" process.

Instead of providing a timeline showing actual deadlines, Respondents try to impress this Court by arguing that the federal government has taken preliminary steps. *Id.* at 7, 10. Specifically, Respondents note that the federal government has produced a draft Archive Search Report, which was compiled in 2001 as an addendum to a 1993 report that compiled historical records, interviews, and site surveys to determine the nature of military testing conducted on the Cannons' property. *Id.* Respondents also point to a draft Engineering Evaluation and Cost Analysis Report ("EE/CA"), which was completed in draft form in 1998 but never finalized; and a draft site inspection plan, produced in 2006 and purportedly finalized in 2007.[1] *Id.* Respondents further point to rights-of-entry secured from the Cannons. *Id.* at 10.

---

[1] Respondents moved below for the Tenth Circuit to take judicial notice of the final site inspection plan. Although the Cannons did not oppose the motion, insofar as it related to the existence of the final site inspection plan, the Tenth Circuit

(Continued on following page)

When viewed in context, the purported "ongoing" investigations amount to little more than paper-pushing exercises intended to deprive federal courts of jurisdiction to review Respondents' disregard for CERCLA's mandate to expeditiously clean up hazardous waste sites, including the Cannons' property. 42 U.S.C. § 9604. The most recent series of "ongoing" investigations began only after the Cannons filed this case in November 2005; indeed, Respondents can point to no action actually occurring *on* the Cannons' property between 1996, when the draft EE/CA was produced, and the initiation of the instant lawsuit in 2005. These are hardly the actions that result in the type of progress toward cleaning up hazardous waste sites intended by CERCLA. *See Frey*, 403 F.3d at 834 ("[T]he time limits in § 113(h) are geared to concrete, existing, remedial measures; not measures that might be devised as some future date." (internal quotation omitted)).

Forward progress lies at the heart of CERCLA's timing-of-review provision, as acknowledged by the Seventh Circuit in *Frey*. 403 F.3d at 834 (CERCLA requires "active steps designed to clean up a site." (internal quotation omitted)). As Respondents note, the timing-of-review provision of CERCLA is intended

---

denied the motion. App. 14, n.6. Like the draft site inspection plan, the final version commits no resources to cleaning up the Cannons' property and contains no timeline for completion. Instead, it merely provides guidelines for the methodology to be employed in surveying the Cannons' property.

to bar judicial review "that might interfere with the *expeditious* cleanup effort." Respondents' Brief in Opposition at 6 (emphasis added). In this case, however, it is the Respondents who themselves, not the Cannons' lawsuit, are responsible for the interminable delay in the cleanup of the Cannons' property.

Respondents assert that judicial review in this case would "risk substituting a federal court's judgment for the authorized judgment of the Corps [of Engineers] about what steps are necessary and appropriate with respect to [the Cannons'] property." *Id.* at 12 (internal citations and alterations omitted; remaining brackets added). This argument misstates the purpose of this lawsuit. The Cannons have not asked any federal court to usurp the Corps of Engineers' discretion as to what actions are required to clean up their property. All the Cannons seek is an order requiring the Corps of Engineers to commit to an objective timeline providing goals and objectives leading to the cleanup of the Cannons' property, if the Corps of Engineers determines that a cleanup is necessary. Petition for Writ of Certiorari at 26-27 ("[T]he Cannons' property cries out for a federal court to assert jurisdiction to oversee and establish deadlines in the CERCLA process . . . to ensure that the Corps of Engineers develops a comprehensive plan to evaluate the environmental conditions on and beneath the Cannons' property, completes the necessary studies and evaluations, and determines whether a response action is required and, if so, how and when the cleanup will be completed."); *see Frey*, 403 F.3d at

834-836 ("We recognize that Congress intended for remedial action to be complete before permitting judicial review. Congress did not, however, intend to extinguish judicial review altogether." (internal citations omitted)).

Respondents also assert that the form of relief that the Cannons seek would "relate to the goals of the cleanup." Respondents' Brief in Opposition at 12. In support of this argument, Respondents cite *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006), wherein the State sought monetary damages from potentially responsible parties under tort theories. This argument, however, also misstates the Cannons' position. The only goal sought by the Cannons is the cleanup of their property. Petition for Writ of Certiorari at 26-28. Or, in other words, the Cannons' only goal is to have the federal government cease the endless "ongoing" investigations and actually do what Congress intended them to do: clean up the private property that the federal government contaminated. After more than 63 years, three generations of Cannon family ownership of the property, and two federal lawsuits, this is not asking too much.

Respondents' attempt to distinguish the Seventh Circuit's *Frey* holding from the case at bar is meritless. *See* Respondents' Brief in Opposition at 12-14. Respondents argue that this case differs from *Frey* because the Cannons have not contended that the "Corps [of Engineers] has completed a removal or remedial action with respect to their property." *Id.* at 13. Objectively, this Court should look to the actions

of the federal government, not to whether the Cannons have asserted that a cleanup has been "completed." Indeed, based upon the history of delay followed by intermittent "ongoing" study, any property owner could reasonably, objectively conclude that no cleanup was forthcoming at all. Regardless, the holding in *Frey* is directly on point. The Seventh Circuit expressly rejected an "open-ended prohibition on citizen suit" and, instead, required the federal government show "active steps designed to clean up a site . . . not measures that might be devised at some future date" before CERCLA's timing-of-review provision may be invoked. *Frey*, 403 F.3d at 834. Here, Respondents have failed in that showing.

Finally, Respondents contend that "the factbound question whether the government is proceeding with reasonable dispatch in this case would not warrant this Court's review." Respondents' Brief in Opposition at 14. This argument is spurious; there are no issues of fact to be resolved. A delay of more than 63 years, with no objective cleanup occurring on the Cannons' property, is the antithesis of the expeditious cleanup of a hazardous waste site as mandated by CERCLA. Indeed, the federal government's continued delay is unreasonable per se and cries for a federal court to exercise jurisdiction.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted by,

RONALD W. OPSAHL
Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

HAL J. POS
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 532-1234

Attorneys for Petitioners

Dated: March 9, 2009